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# Judicial Review, Transnational and Federal: Its Impact on Integration

by

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## I. Introduction

It is a commonplace that a federal or transnational union of states is one way to promote legal integration. Both the United States and the European Community[1] -- to take only the two unions principally concerned in this study -- were founded in part to promote greater legal harmony, and the same is no doubt true of other federal systems. It is probably a further commonplace that little actual integration among members of a federal or transnational union of states can take place without judicial assistance. Judges do, after all, apply laws. Yet, the questions that often demand judicial answers in the federal or transnational union, as well as the nature and limits of the judicial role in a federal or transnational system of government, are complex and deserve critical analysis and the careful attention of anyone interested in federalism, transnationalism and legal integration. Let us begin by outlining some of these questions.

### A. Supremacy

Legal integration requires, conceptually of course, no more than the uniform application and enforcement of a law in more than one nation or state. One could, it is true, achieve this result through national

conquests or mergers, with all government power being simply assumed by a central government. But one may doubt the desirability of this course and thus settle for the federal or transnational union in which government powers are divided or shared among several sovereigns: state and federal as in the United States, or national and transnational as in the European Community. Now, it is evident that in such a union the laws of the federal or transnational government will sometimes conflict with those of a member state. When this occurs, as people cannot reasonably be expected to obey at the same time two conflicting commands, the law of one sovereign must apply at the expense of the law of the other, and in the federal or transnational union, if the union -- and integration -- are to be meaningful, it must be the federal or transnational law that is supreme. Without this supremacy, the federal or transnational law can have no direct integrative force.

Legal integration in the federal or transnational union requires first and foremost, therefore, acceptance of a legal hierarchy. The federal or transnational law when it conflicts with the law of a member state must be deemed to be "higher" law, and must apply at the expense of the conflicting national law. Although this principle

of supremacy is itself frequently declared in the constitution or treaty establishing the union, application of the principle depends on those who apply the law. Maintaining the supremacy of the federal or transnational law must be, therefore, the initial contribution of the judiciary to legal integration in the federal or transnational union. Indeed, without judicial review, or some similar instrument of control, the supremacy of the federal or transnational law must remain at best theoretical, and its force merely exhortatory. 2/ And, if the constitution or treaty establishing the union fails to clearly establish the supremacy of the federal or transnational law, the challenge to the judiciary on this question will, of course, be all the greater.

B. Powers

The principle of supremacy does not mean, however, centralization of power in the federal or transnational union. To the contrary, federalism and transnationalism both presuppose to some degree the decentralization or sharing of power. There are good reasons for this. Harmonization of the law among nations or states may be a more or less worthy goal depending on many factors. Not every area of the law equally demands

harmonization, and in many areas local control affords a flexibility, a responsiveness to the desires of citizens in different regions with different values, that surely outweigh any benefits of harmonization. In any federal or transnational union, therefore, a second fundamental question will concern the division of law-making powers and responsibilities among the different sovereigns.

This division of powers is initially, of course, a responsibility of the constitutional draftsmen, and every constitution or treaty establishing a federal or transnational union in some manner defines the powers granted and retained by the constituent states or nations. Important questions inevitably remain, however, questions which sooner or later also demand judicial attention in any federal or transnational union. Some of these questions arise simply from the natural imprecision of language -- e.g., what is the meaning of "commerce" in the commerce clause of the U.S. Constitution? what federal or transnational powers, if any, may be implied from those explicitly granted in the constitution or treaty?

Another set of questions concerns the nature of the powers granted. For example, which powers reside exclusively in the federal or transnational government and which are held concurrently or partially concurrently by the member states? And, related to this, to what extent

does an exercise of power by the federal or transnational government preempt those powers held concurrently by the member states? While the basic issue of supremacy does not allow of compromise in any meaningful federal or transnational union, these derivative questions concerning the division of power can only be answered after careful consideration of the often competing claims of uniformity and diversity.

C. Judicial Procedure

A federal or transnational union also presents procedural challenges,[3] challenges that are in large measure corollaries of the principle of supremacy. One of these corollaries is that, if federal or transnational law is to be supreme, there must be a final interpreter of federal law with the power of binding the governments and courts of the member states. For, if there is no ultimate voice and governments and courts of the member states are free to adopt whatever interpretation of federal law best suits their purposes, the principle of supremacy, and integration -- which to some degree must mean uniformity of application and effect among member states -- will risk great subversion. Another of these corollaries, also flowing from this need for uniformity of application and effect, is that supremacy and integration must mean harmonization not just of laws, but also of the means of making laws effective.[4] For although the text

of the law may read the same in two countries, the rights of the citizens of those same countries will differ if their courts are unequally available for the vindication of those rights. The more unequal the access to judicial protection and the more varied the legal systems, the more formidable will be the problem. It potentially will be a compelling problem indeed, therefore, in the federal or transnational union comprising countries with different legal traditions and varied judicial customs.

However, these very differences in legal traditions, institutions and judicial customs suggest that this access-to-justice problem confronting legal integration in the federal or transnational system does not permit a monolithic solution. Both realism and good sense counsel that imposing uniform procedures for all courts in a union comprising diverse legal traditions is neither possible nor desirable. Thus, while believing that the legal systems in the federal or transnational union must in some way afford centralized control of the interpretation of federal or transnational law, one must also accept that the rules governing access to the courts be flexible and sensitive to legitimate demands for diversity and national autonomy.

D. Fundamental Rights

So far, we have described legal integration in the federal or transnational union as involving a process of ordering legal hierarchies. In part this process involves resolving substantive questions and in part procedural questions. Each of these questions, however, is ultimately concerned with integrating the federal or transnational and state or national legal orders in a way that fairly balances the interests of legal uniformity and integration -- interests represented by the federal or transnational institutions -- against legitimate member state interests and prerogatives. This ordering of legal hierarchies does not, however, mean that federal or transnational law must inevitably prevail in any conflict with competing legal norms in the federal or transnational union. There is a further challenge to legal integration.

Legal integration proceeds, we said, from the power of "higher" federal or transnational law to suppress conflicting and "lower" state or national law. Height, however, is a relative concept: Law A may be higher than Law B but lower than Law C. And, in modern times, federalism and transnationalism have not been the sole sources of "higher" law. Another important source has been

the national "bill of rights", which enumerates and seeks to guarantee those rights of the people that are so fundamental as to be inviolable by any government. The federal or transnational union that includes members whose citizens enjoy such guarantees will thus face, on the question of fundamental rights, a further challenge to legal integration, for it is axiomatic that the national guarantees and the federal or transnational law cannot both be supreme within the same union.

A neatly drawn constitution or treaty establishing a federal or transnational union would, of course, also address this question. But for whatever reasons -- perhaps the powers granted to the federal or transnational legislators seem too weak to pose a threat to fundamental rights -- it may, as in the case of the European Community, be overlooked. When it is, it must inevitably become, as it has in fact become in the Community, a judicial question, perhaps the most difficult question of all. For it is not self-evident that federalism, transnationalism and legal integration are such worthy goals that we would be wise to sacrifice our fundamental rights for their cause. In our age of ever more intrusive governments, people need more, not fewer, civil rights. At the same time, however, to carve out a national exemption to Community supremacy creates a doctrine dangerous to the system in its entirety. Thus, the solution to this fourth fundamental question of judicial concern in the federal or transnational union must seek to preserve the federal or transnational prerogatives not by denying fundamental rights, but by compensating any loss of

national guarantees with the promise to protect fundamental rights at the federal or transnational level. This solution agrees, moreover, with our intuition or belief that fundamental rights represent one area of the law that naturally favors greater integration.[5] This intuition is supported, we believe, by a growing consensus among Western Nations -- as demonstrated by comparative constitutional research [6] and manifested in such accords as the European Convention on Human Rights [7] -- that there exists a core of fundamental rights that no civilized society may disrespect.

E. No "Legal Transplant" from America to Europe

This introduction has suggested some of the questions and problems requiring judicial attention in federal or transnational systems. It has also suggested that differences in legal traditions and judicial customs will significantly influence the judicial answers to many, if not all, of these questions. For, inherent though they may be in any federal or transnational system of government, these questions and problems require answers and solutions that are sensitive to different historical and cultural traditions. Thus, though we may expect many of the answers and solutions to federalism concerns that have been fashioned by courts in the United States to be suggestive of solutions to transnationalism concerns in Europe, it would be naïve to expect the role of European courts in promoting legal integration to be a replay of the role of their American counterparts. European solutions must above all be sensitive to European

traditions, traditions, moreover, which have in the past differed from American traditions on no question more perhaps than that of judicial review. Judicial review is, of course, central to our topic. For, as this introduction has suggested, a significant judicial contribution to legal integration in the federal or transnational union in many ways presupposes judicial review. Any meaningful comparison and analysis of the judicial contribution to legal integration in the United States and Europe must, therefore, commence with an understanding of these differences, as well as of what we believe are their converging trends.

## II. Judicial Review in Comparative Perspective

### A. The Problem of Judicial Review

Judicial review is a conundrum to constitutional democracies. To be sure, the logic of Chief Justice Marshall's doctrine in Marbury v. Madison [8] -- that, if the Constitution is to be "higher law", judges must be bound to apply it over conflicting ordinary law -- is as forceful as it is simple.[9] Alexis de Toqueville recognized the strength of the Marbury logic when he wrote that the "raison d'Etat" alone, and not the "raison ordinaire," had led France to reject the same doctrine.[10] Yet, especially when extended to the unavoidably vague value judgments inherent in much constitutional adjudication, the Marbury doctrine presents exceedingly

serious questions. Ultimately, these questions turn around the "mighty problem" [11] of the role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or "personal predilections" [12] into the relatively empty boxes of such vague concepts as liberty, equality, reasonableness, fairness and due process. [13]

B. The Historical Responses to the Problem of Judicial Review

1. United States

Historically, the United States and Europe have responded to the problem of judicial review in quite different ways. In the United States, judicial review rather rapidly achieved an accepted -- even glorified -- place in the American system of government (aptly defined as checks and balances). Today, nobody in the United States would seriously propose reversing Marbury v. Madison. Yet this does not mean that the debate in the United States over the mighty problem has come to an end. It is, on the contrary, a very lively debate, [14] but one that remains clearly within limits imposed by the requirements of a federal system of government. Thus, Americans argue about whether and when it is legitimate for the Supreme Court to invalidate a law on the ground that it violates some vague prohibition of the Bill of Rights, but no one questions the Court when the issue involves a conflict between "higher" federal law and "lower" state law. Most Americans, we believe, would still approve what Justice Holmes said many years ago:

> I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States. [15]

Judicial review *per se* is simply not an issue in the United States. It is too obviously required for the success of the American federal system.

2. *Europe*,

In the United States then, the mighty problem was early resolved in favor of judicial review, and the subsequent debate, heated though it has often been, has been concerned more with the limits than with the necessity of the institution. In Europe, on the other hand, from the time of the French Revolution until the end of World War II the mighty problem was resolved largely against judicial review, and such appearances as it made were short-lived and, on the whole, unsuccessful.[16] In part, of course, Europe rejected judicial review because most European countries had strong central governments and no need for the institution, comparable to the need created by federalism in America. More fundamentally, however, Europe's historical rejection of judicial review may be traced to the mighty problem itself. For judicial review, at least when vague constitutional questions are involved, can be seen as undemocratic, although, for reasons that are developed further on,[17] less so, we

believe, than its critics claim. Thus throughout the nineteenth and the first half of the twentieth centuries in Europe the national parliaments, embodiment of the democratic will, remained largely immune to judicial or constitutional control. ⟶ ⟵And, no especial conflict between the idea of fundamental rights and the democratic ideal emerged from this situation. / Proponents of human rights and supporters of parliamentary supremacy were largely one and the same. They pursued the first goal through the means of democratic control and put their trust in the elected spokesmen for the majority.

The history of parliamentary supremacy is, nevertheless, peculiar to each nation. In France, for example, it may be traced to the abuse of the judicial office by the Parlements — the higher courts of justice — of the Ancien Régime, which asserted the power to review acts of the sovereign against "fundamental laws of the realm"[18] and arrogantly used such power to declare the heureuse impuissance of the legislator to introduce even minor liberal reform.[19] Largely as a result of such abuses and the consequent unpopularity of the judiciary, the ideology of the French Revolution proclaimed as one of its foremost principles the supremacy of statutory law and demoted the judiciary to what was conceived of as the mechanical task of applying the law to individual cases.[20] In England, on the other hand, where the judicial role in protecting individual liberties enjoyed widespread respect,[21] the triumph of parliamentary supremacy in the "Glorious Revolution" of 1688 reflected not so much revulsion against the judiciary as affirmation of the principle, later certified by Blackstone in his Commentaries,[22] of the absolute supremacy of Parliament -- and its corollaries, the omnipotence of positive law and judicial powerlessness to control or review statutory law.[23]

What is common to these diverse national experiences, however, is the supreme position accorded to parliament. This period of parliamentary supremacy has elsewhere been called the era of "legal justice".[24] The ideologues of legal justice denied that the law is something existing in nature that judges find. Laws are made by man. Legal justice also meant that judges should be subservient to the law, and in order that they might not mistake what the law did and did not require, it was obviously convenient that the law be written down. In theory, everyone else too could then "know" the law. The era of legal justice thus found its natural expression in the great national codifications, exemplified by the Code Napoléon, which tried so to occupy the legal order with written, or positive, law as to leave no room for what Jeremy Bentham, in advocating English codification, called, and condemned as, "judiciary law".[25] It is true that the idea of legal justice was not in principle opposed to the written constitution. But judicial subservience to the law necessarily meant, or was believed to mean, the impossibility of effective constitutional control of parliamentary power. Thus, while written constitutions purporting to guarantee fundamental rights were hardly unknown in nineteenth-century Europe, their power was more theoretical than real. Italy's Statuto Albertino, for example, could

be altered by ordinary statute , and the French theoretically
Constitutions of 1799 and 1852, while admitting the
possibility of constitutional control of ordinary
— largely ineffective —
legislation, gave the power of deciding constitutional
not to courts but
questions to politically controlled bodies.[26]

Later attempts as were made at implementing judicial review in Europe were, not surprisingly, short-lived or otherwise limited in their effects. The most ambitious of these efforts occurred in Austria and Weimar Germany. The Austrian Federal Constitution of 1920, after the Verfassungsnovelle of 1929[27] gave to certain courts the possibility of challenging before the newly established Constitutional Court ordinary statutes that violated the Constitution. In Germany the landmark decision of November 4, 1925 of the Reichsgericht[28] introduced judicial review of legislation on the strength of Marbury's principle that in a hierarchical legal order courts are bound to prefer constitutional norms over conflicting ordinary legislation. But both attempts to introduce judicial review ultimately failed under the onslaught of fascist regimes whose ideologies included no place for principled restraints on government power.

C. The Converging Trends and Remaining Differences

Since World War II, many European countries have changed their minds about judicial review -- and, indeed, they have done so even about judges controlling ordinary legislation on the basis of vague appeals to fundamental rights, which is to say judicial review in its most controversial form.

1. Reasons for the Modern Revival of Judicial Review in Europe. There are, we think, two principal reasons for the revival of judicial review in Europe, leaving aside for the moment the role that the foundation of the European Community and transnationalism have played in this revival. First, fascism and World War II demonstrated the horrendous potential for tyranny, even majority tyranny, of governments not subject to constitutional restraint. From the war's legacy of human tragedy and political oppression was thus revived the movement towards constitutionalism cut short by the rise of the fascist regimes. Second, the post-war period coincided with the growth in the industrial West of what we have come to call the welfare state, which has produced profound changes in the role and structure of government. These changes have given further impetus to the adoption of written constitutions -- as repositories of fundamental rights -- and to the recognition of the

desirability of judicial review as a check on both the explosion of legislation and the proliferation of relatively unaccountable administrative agencies -- two phenomena that characterize the welfare state and on which some elaboration seems appropriate here.

The welfare state was, and is, ⟶ in many ways an inevitable response to the problems of Western post-industrial societies. Among the most serious of these problems have been, in generic terms, "the unwanted side effects of ... production and consumption decisions,"[29] what economists call generally "externalities". While such unwanted side effects are, no doubt, present in all countries, no matter what the state of economic development, they are more complex and pressing the more a society is "affluent, urbanized, technologically advancing, economically dynamic, and chemically inventive."[30] Thus, they have been especially pressing in advanced Western democracies.

↓ ↓

Governments in the West have responded to the problem of external costs in many ways, but especially by intervening more and more in economic and other private relationships. For, the more these problems have become complex and pressing, the more the libertarian capitalist state, which limited itself to enforcing the rules of the economic game through contract law and antitrust policies, has become obsolete. Contract and antitrust laws could

encourage people to weigh the immediate "contractual" consequences of their "production and consumption decisions," but not these more diffuse and indirect social and environmental costs.[31] Since those outside the contractual relationship -- e.g. the general public, those in the neighborhood, or downstream -- bear the costs, economic bargaining among the principals does not properly constrain or evaluate the process. Hence, it has become perhaps inevitable for governments in any economically advanced nation to attempt to alter these "free market" rules to require people to consider the true costs of their decisions. Such attempts have ranged from specific legislative commands and regulations to the setting of priorities through short- and long-term planning, from guidelines and framework directives to the imposition of taxes and liabilities as well as to pressures through the award of indirect incentives.[32] All, in a sense, have involved a derogation of certain individual liberties vis-à-vis the government, which is not to say a lessening of justice, equality or even necessarily an overall lessening of liberty.

Originally, these derogations were primarily legislative interventions, indeed an "orgy of statute making" as this phenomenon has been pointedly characterized by Professor Grant Gilmore.[33] But, in time a more and more complex administrative apparatus, often endowed with broad discretionary and even legislative powers, has been required in order to enforce, concretize, monitor and supplement these interventions. The "welfare state," at the

beginning essentially a legislative state, has thus become more and more an administrative, indeed a bureaucratic, state, with the danger of its perversion into a police state.[34] This metamorphosis is the natural outcome of the vast, unprecedented undertaking of government in the welfare state.

That these transformations are in a fundamental way constitutional transformations should be evident. They involve essentially a siphoning of power from the private to the public sector, and substantial delegation of the power so siphoned to administrative bodies. And, while such delegation of power to administrative agencies when undertaken by an elected legislature confers on the agencies a semblance of democratic legitimacy,[35] the size of the administrative bureaucracy in most modern welfare states, as well as the scope and complexity of the tasks which it must undertake, make continued parliamentary oversight theoretical at best.[36] Hence, the legitimacy conferred is more formal than substantive. It must be no great surprise, therefore, that the French Constitution of 1958, inspired by General de Gaulle, has limited the legislative jurisdiction of Parliament to a list of enumerated areas, while reserving all the rest to the legislative ("regulatory") power of the executive, a power which is entirely autonomous from parliamentary control.[37] The written Constitution has thus been made to reflect, perhaps with admirable frankness, constitutional reality.

It is clear nevertheless that these constitutional transformations (speaking again not just of France) are potentially pathological. While parliaments may prove (indeed have proved) incapable of acting as omnipotent engineers of social progress, the emergence of the administrative state may bring about other, no less serious, problems, problems deriving substantially from the lack of direct electoral control of the administration. The dangers of bureaucratic abuses are too much a part of the political folklore of all Western societies to need specific elaboration.

These alterations in the power structure of modern societies, being themselves "constitutional," clearly have had constitutional implications. Not surprisingly, therefore, the acceleration of legislative limitations on individual conduct has revived interest in the search for a core of fundamental substantive rights, a reservation of powers to the individual,[38] while the growth of the administrative state has renewed the quest for fundamental procedural guarantees. Such procedural guarantees have typically included rights to judicial review of administrative action, to notice and a fair hearing, to legal counsel and against self-incrimination.[39]

These constitutional transformations thus have renewed the possibility of judicial review of legislation even in countries previously committed to parliamentary supremacy. After all, administrative legitimacy to legislate is hardly better-founded than judicial legitimacy to perform such review. The problem of administrative legitimacy became apparent in France, for example, soon after promulgation of the new Constitution in 1958. So long as administrative decrees had been issued pursuant to authority delegated by Parliament, they had been considered as "enabled by statute" and, as such, they had continued to bear the mantle of democratic legitimacy. The enabling statute's supremacy vis-à-vis the judiciary had thus been preserved. The termination of parliamentary sponsorship, however, removed this protective mantle and opened the way to judicial review of laws (règlements) issued by administrative decree pursuant to the powers reserved to the executive under the new Constitution. The Conseil d'Etat was not long in seeing this opening, and in 1959, in the landmark decision of Syndicat Général des Ingénieurs-Conseils [40] it established that executive legislation is subject to judicial review for conformity to the "principes généraux" contained in, or derived from, the Déclaration des droits

de l'homme of 1789, the Preambles (i.e., the bills of rights) of the 1946 and 1958 Constitutions,[41] and the (hazier yet) "Republican tradition".[42] The result of that decision has since been confirmed and consolidated by a number of further pronouncements of the Conseil d'Etat.[43]

Legislation by Parliament, however, has remained beyond the reach of direct review by the Conseil d'Etat, although the Conseil and other French courts have, perhaps, played a more creative role than generally acknowledged in conforming French statutes to fundamental principles under the guise of interpretation and construction. But parliamentary legislation too has been subject to review for conformity to constitutional precepts and the "principes généraux" since a landmark decision in 1971 by the Conseil Constitutionnel[44] -- a new body established by the Constitution of 1958 and originally conceived as having the limited role of preventing parliamentary interferences within the autonomous legislative power of the executive. Such review is still limited, however, to the period prior to promulgation.[45] Once promulgated, parliamentary legislation in France cannot be challenged for non-conformity to the Constitution.

Resistance against "government by the judges," so strong in France, has had and still has its manifestations elsewhere on the Continent as well. In such countries

constitutional guarantees must remain dependent on the socio-political conscience of the nation. Several countries, however -- indeed, a growing number of countries -- have lately avowed the importance of judicial review in the protection of the democratic state. Austria re-established its 1920-29 system of constitutional adjudication in 1945,[46] and both Italy and the Federal Republic of Germany created Constitutional Courts in the aftermath of World War II.[47] These countries have openly professed to see in their Constitutional Courts, especially in the Courts' principal role of judicial review of the constitutionality of legislation, a pivotal tool for protecting themselves against the return of the evil: the horrors of dictatorship and the consequent trampling upon fundamental human rights by legislators subservient to oppressive regimes.[48] In fact, independent adjudicators such as those in the newly established Constitutional Courts have been expected to act as stabilizing anchors to protect freedom in a turbulent age. In the view of the drafters of the new Constitutions, "constitutional justice" (Verfassungsgerichtsbarkeit) has become the ultimate "crowning" of the Rule of Law, hence the foremost development of a really democratic and civil-

libertarian state.[49]

2. Variations Within a Converging Trend. This is not to suggest that the practice of judicial review is the same in all countries. True as it may be that the impressive spread of judicial review of constitutional questions represents an important converging trend in Western societies, the remaining differences are also important. Three of these differences especially deserve mentioning.

(i) First, if many European countries have come to approve Marbury's result, few countries outside the Common Law world have been willing to implement to its logical end Marshall's rationale in that case. That rationale led to the conclusion that all courts confronted with a conflict between ordinary law and higher constitutional law were bound to give effect to the latter at the expense of the former. In most Civil Law countries, the conferral of such power on all courts has proved unacceptable, or otherwise impracticable. Thus, instead of the "decentralized" system of judicial review found in the United States and other former British colonies, these countries have given the power of constitutional review to a single high court, typically a specially created constitutional court, and have denied such power to all other courts.

The principal reasons for the rejection of decentralized control and the adoption of centralized review are themselves threefold.[50] First, centralized control requires less drastic alterations in the doctrine, central to the Civil Law tradition, of the separation of powers and the supremacy of parliament. If such supremacy must be checked by an independent power, better that such power be exercised by a single court, itself more easily surveilled, than by every petty judge and magistrate.[51]

Second, the doctrine of stare decisis, which requires courts to follow their own precedents and/or those of superior courts within their jurisdiction and thus permits centralized control within a decentralized system, does not exist as such in the Civil Law tradition. Without such a doctrine, decentralized control risks degenerating into chaos. A law deemed unconstitutional by one judge may continue to be applied by another, or even resurrected by the first on other occasions. Constitutional rights thus may differ from chamber to chamber, day to day and litigant to litigant.[52]

Third, even though a limited de facto precedential effect does derive from decisions of traditional appellate courts in Civil Law countries, these courts usually lack

the structure, procedures and mentality demanded by constitutional adjudication.[53] In structure, they are too large and diffuse to insure that uniformity and command that respect demanded of a constitutional adjudicator. In procedures they lack the discretionary power to limit their jurisdiction to the cases and issues that really matter.[54] Appeal being usually as of right, their attention and their voice are too easily diverted and distorted by trivia. And, in mentality too they often lack the temperament and inclination to make the hard, controversial choices often demanded by constitutional adjudication. In Civil Law countries, a career in the judiciary is often a career like that of any public servant. The judge-aspirant trains in the technical application of statutes, graduates to a judgeship, advances by seniority and retires to his pension.[55] Such a career neither attracts people with penumbral vision, nor trains them in clairvoyance.

(ii) The second difference between judicial review as practiced today in the United States and Europe is more surprising -- even paradoxical. For, though many think of the United States as being the very "motherland" [56] of judicial review, in post-World War II Europe judges have perhaps been even more daring in their methods of review than their American brethren. To appreciate the point, the terminology adopted by Professor Thomas Grey can be of help.

Grey distinguishes a "purely interpretive" and a "non-interpretive" model of judicial review. The former, which "has recently called forth an unusual number of explicit affirmations" by American writers,[57] was the model originally affirmed by Alexander Hamilton and Chief Justice Marshall and later advocated by such American critics of the non-interpretive model as Judge Learned Hand.[58] It can be defined as follows: "... legitimate constitutional adjudication is limited to the application of concrete norms derivable from the written constitution itself."[59] The non-interpretive model, on the other hand, is distinguished by Grey in several forms: "The purest form ..., a form virtually moribund [in the United States] today, invokes general principles of republican government, natural justice or human rights as confining legislative authority regardless of the terms or even the existence of a written constitution."[60] The other forms, which Grey calls the "surviving forms," have one basic feature in common: they "all claim some connection to the constitutional text" even though "their actual normative content is not derived from the language of the Constitution as illuminated by the intent of its framers."[61]

¶ As already noted, ↓ ↓

/the French Conseil d'Etat and Conseil Constitutionnel, on the other hand, when they have undertaken to control

the conformity of executive and parliamentary legislation to vague, undefined, mostly unwritten "general principles" and "Republican traditions" -- principles and traditions creatively "found" by the judges themselves and affirmed as having a higher law status -- have not only gone beyond a merely interpretive model of review, they have reached out to the "purest form" of non-interpretive review, the form "virtually moribund" in America today.[62] A similar development also characterizes the case law of the Court of Justice of the European Community, which is discussed further on.[63] For, this Court too has appealed to "general principles", principles found by the Court itself and forming what is seen as an emerging transnational -- and as yet unwritten -- Bill of Rights of the European Community.

(iii) The third difference between judicial review in the United States and Europe today is related to, is indeed the reverse of, the second difference. It is mentioned only in passing here, for it too requires fuller treatment at a later point.[64] The difference is this. —> Transnationalism -- or more specifically, the idea that European Community or transnational law should be superior to national law -- remains controversial in Europe, whereas in the United States the supremacy of federal law is accepted by all. And thus, judicial review in a transnational capacity remains quite controversial in Europe,

whereas, as we have said, it has long been seen as a necessity in the United States.

With these similarities and differences in mind then, we shall now consider the impact of judicial review on American and European legal integration. For the purposes of this study, the discussion of the American case will be brief and merely instrumental to a better understanding of the European case. Also, no attempt shall here be made to undertake a critical examination of the specific doctrines upon which our comparative analysis is founded.

## III. Federalism, Judicial Review and Integration in the United States

### A. Supremacy

As noted, in any meaningful federal union the supremacy of federal law is an important matter. It is not necessarily, however, or even usually, a question for judicial resolution, and such has been true of supremacy in the United States. There, the authority of the United States Congress to adopt laws of general effect in all the states, far from being a judge-made doctrine, was set forth in the aptly named supremacy clause of Article VI of the Constitution.[65/] Indeed, supremacy was one of the least controversial issues at the Constitutional Convention of

1787.[66] For, in the view of most of the members of the Convention the principal defect of the Articles of ~~Confederation~~ then in effect ~~was~~ their failure to confer supremacy on the central government.[67] Thus the very first vote of the Convention as a whole was the adoption of a resolution "that a national government ought to be established consisting of a supreme Legislative, Executive and Judiciary."[68] And, it followed from this decision that the new federal government, "instead of operating on the States should operate without their intervention on the individuals composing them ...."[69] The new government would, in other words, be a national government, and the citizens of the states would be citizens of the nation as well.

B. Powers

1. Implied and concurrent powers. —> —> —> —> When federal law is the supreme law of the land by virtue of the constitution, and states are precluded from brazenly ignoring federal laws they do not like, constitutional disputes tend to turn to other matters. One question they often turn to is that of power, and it is in the definition of federal powers that the U.S. Supreme Court has made some of its most important contributions to integration in that country. —> These contributions have

not, however, been insensitive to the often competing claims of the federal and state governments. On the one hand, the Court, beginning with its broad interpretation of the "necessary and proper" clause in McCulloch v. Maryland [70], has contributed significantly to the expansion of federal powers. That case early laid the foundation of an "implied powers" doctrine that has ever since served well in protecting and expanding federal powers.[71] And in this century, the Court has opened the way to the federal government assuming nearly unlimited powers vis-à-vis the states through expansive interpretations of the commerce clause[72] and toleration of legislative delegation of power.[73] These Court interpretations have both greatly expanded federal competence and permitted the creation of the administrative bureaucracy capable of exploiting the expanded federal powers. Thus, while we may agree with Sir Kenneth (now Lord) Diplock that courts could never have created the welfare state,[74] in the United States it is doubtful whether those features of the welfare state that there exist could ever have been created without the cooperation of the judicial branch.[75]

On the other hand, while the Supreme Court has been active in expanding federal powers, it has also been sensitive to

state interests. This sensitivity is best reflected, perhaps, in the Court's elaboration of a "concurrent powers" doctrine, particularly as regards state regulation of commerce, and its relatively restrained application of the "preemption" doctrine. The problem presented by the commerce clause is, stated simply, as follows: Article I, Section 8 of the Constitution gives Congress power "To regulate Commerce with foreign Nations, and among the several States ...." Now if the commerce clause grants to Congress exclusive power to regulate commerce, any state law affecting commerce among the states would be, by virtue of such exclusivity, unconstitutional. If, on the other hand and as many once argued, the states retain powers coextensive to those granted to the federal government, then state laws affecting interstate commerce must be valid unless Congress has adopted a contrary law. The unconstitutionality of the state law in that case, however, would result from the supremacy clause, not from the commerce clause.

These are, of course, the extreme positions.[76] A more moderate position, and one eventually taken by the Supreme Court in Cooley v. Board of Wardens of the Port

of Philadelphia [77], permits the states to exercise some control over local commerce, while recognizing that certain questions so fundamentally affect national interests as to be impermissible subjects of state regulation. This compromise attempts to take into account the interests of the nation as a whole as well as those of the separate states. It seeks to distinguish, in the words of Justice Jackson, "between the power of the State to shelter its people from menaces to their health and safety and from fraud, even when these dangers emanate from interstate commerce, and its lack of power to retard, burden or restrict the flow of such commerce for their economic advantage...."[78]

2. Preemption.

The doctrine of preemption also has its extreme forms. In its most extreme form, in our view a distorted form, preemption is held to mean that all state legislation that enters into areas of federal competence is prohibited.[79] Therefore, federal competence means state incompetence, pure and simple. But this is not preemption at all although it bears a close resemblance to it. Rather, this is the claim that federal powers are ipso facto exclusive powers put forth under another name. True preemption problems, however, arise not from the mere establishment of federal powers, but from the exercise of these powers in areas where the states have retained concurrent competence. Preemption

properly understood
problems /are thus problems of supremacy, but supremacy in a more abstracted form.

Supremacy in its simple form means that when a federal law and a state law conflict, the federal rule prevails: federal law says drive your car in the right lane, state says drive in the left, supremacy tells us that right lane drivers will prevail. Preemption problems, of which one can distinguish two principal types in American jurisprudence, arise from more subtle sorts of conflicts. In one sort, a state law is "preempted" because it is held to conflict with general policy objectives of federal law.[80] In this type of preemption -- which is really a hybrid of supremacy and preemption -- the state retains the power to legislate in the field of federal concern provided that it does not by its legislation promote policies in conflict with federal policies. In the other form -- the pure form -- a state law is preempted because federal laws or federal concerns in the area are so comprehensive or compelling that they are deemed to transform the federal competence into an exclusive power.[81] The concurrent state power to regulate in the field is thus extinguished. It is truly preempted.

Now it is evident that the pure form of preemption is more of a threat to states' rights than the more limited "hybrid" form. It should also be evident that preemption analysis in this pure form will often closely resemble commerce clause analysis. For both involve the sacrifice of state powers for the sake of federal interests. This suggests that preemption analysis, like commerce clause analysis, should also require a careful balancing of federal and state interests. Such, indeed, has been the direction that the U.S. Supreme Court's preemption analysis has taken.[82] Thus, it has largely avoided a formalistic approach requiring federal preemption every time Congress passes a law regulating a new area of social or economic activity. And, in general, the Court has held in favor of preemption only when "/t/he scheme of federal regulation /is/ so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it .../o/r the Act of Congress /touches/ a field in which the federal interest is so dominant that the federal system /is/ assumed to preclude enforcement of state laws on the same subject."[83] When the federal scheme has been less than comprehensive, or the federal interest not clearly dominant, the states have been left free to enact parallel legislation not openly conflicting with federal law, or hindering federal policies.[84]

C. Procedures

When federal law is unarguably the supreme law of the land, judicial or constitutional procedure, like questions of power, becomes another topic of hot debate. At one fundamental level this procedural debate is about whose word shall be the final word in constitutional disputes. At another, perhaps no less fundamental, level, it is about how the federal system accommodates the constitutional claims of its citizens. Procedural problems in the federal system are thus concerned with how to assure uniformity of constitutional interpretation and application among the many states of the union, each with its own system of courts.[85]

The framers of the Constitution sought to mitigate if not solve these procedural problems by establishing the Supreme Court and authorizing Congress to establish other federal courts.[86] Congress immediately exercised this authority to establish lower federal courts,[87] and perhaps today the most notable feature of the American judicial landscape is the parallel existence of federal courts, with power in certain instances to entertain state law questions, and state courts with similar powers vis-à-vis federal law. How are these parallel judicial systems to be integrated?

The answer might seem /obvious enough. We would expect the Supreme Court to be final arbiter of federal, including federal constitutional, questions, and the respective state high courts to be supreme within their own jurisdictions.

This theoretical simplicity, however, is not so easily established in practice. The preeminence of the Supreme Court in matters of federal law, widely accepted though it may be today, was not, contrary to one's expectations, assured by Marbury v. Madison. While Marbury established judicial review and the supremacy of the Constitution, it did not guarantee the supremacy of the Supreme Court as interpreter of the Constitution, and the first half of the nineteenth century witnessed repeated challenges to the Court's view of its own preeminence. Thus, in 1815 we find the Virginia Court of Appeals denying the jurisdiction of the Supreme Court to review its interpretations of the federal Constitution on the grounds that the courts of one sovereignty cannot be deemed superior to those of another.[88] An even more extreme position, espoused by a number of spokesmen of the antebellum South, claimed the right of the states to "interpose" their own interpretations of the Constitution to prevent the enforcement of federal constitutional inter-

pretations, the most notorious of these efforts being the South Carolina nullification movement of 1832 and, of course, the secession of the Confederate states.[89]

Although the supremacy of the Supreme Court as interpreter of the Constitution was eventually established, the search for uniformity has presented continuing challenges. For one, the ability of the Court to settle federal law disputes depends on it having jurisdiction to "hear" them when they arise, and until early in this century, appeals to the Supreme Court from state court proceedings involving federal law were allowed only when the federal claim was denied by the state court.[90] This regime, it is true, upheld Supreme Court supremacy, but the absence of appeal in cases when the federal claim was sustained in the state proceeding often prevented the Court from resolving conflicts in the interpretation of federal law. The goal of uniformity was thus frustrated. With the expansion of federal law this limitation of the Court's appellate jurisdiction eventually became untenable and in a series of reforms early in this century was removed by Congress.[91]

More serious problems arose, and still arise, from the Court's refusal to review state court decisions interpreting federal law that may be deemed also to rest on "adequate and independent state grounds."[92] This policy, founded in part

on the demands of judicial economy and in part on notions of comity that frequently affect federal-state judicial relations in the United States, obviously may operate to frustrate the vindication of federal rights. Particularly is this so when a suit raising substantial federal questions is dismissed for failing to comply with state procedural requirements.[93] Not only are federal rights frustrated, but variations in procedure from state to state will mean that the ability of a citizen to vindicate federal rights will, to an extent, differ from state to state. The Supreme Court admittedly has tried to mitigate these problems and, thus, frequently has stated that any state grounds for dismissing a federal claim must be "fair" and "substantial", terms not notable, however, for their precision.[94]

Nor are all such problems eliminated by the availability of federal courts for the vindication of federal claims. First, there are difficulties of definition. For example, significant federal obligations may be enforced by permitting private individuals to bring damage actions against those who violate federal law. But, as is often the case, the statute creating the federal obligation may not expressly provide a cause of action for the person who is injured by a violation of the statute.[95] If such a cause of action is permitted by implication, does it present a federal claim cognizable in

federal courts, or does it arise merely from state tort law? What statute of limitations applies? If the action itself is not provided for by the statute, it seems obvious that neither will be the limitation period. Theoretical as these questions may appear, it was only in 1971 that the Supreme Court held that the victim of an unreasonable search and seizure in violation of the Fourth Amendment had a cognizable federal claim.[96] And, as for the applicable statute of limitations, the Court consistently has refused to fill these lacunae in the federal law and to this day requires District Courts hearing suits implied under federal law to apply the statutes of limitations of the state where they sit.[97] It should be added, however, that to prevent inequitable results, the state statute may be tolled (i.e. the limitation period will not begin to run) so long as the injured party has not discovered, and could not reasonably have discovered, the violation of rights giving rise to his claim.[98]

The Supreme Court's solutions to these problems, like its solutions to commerce clause and preemption problems, may thus be seen to involve a compromise/between the demands of uniformity and diversity in the federal system. — on the whole, a very healthy one — Similar compromises recur frequently in the Court's jurisprudence; they represent, it is clear, an important theme in the history of American legal integration.[99]

D. Fundamental Rights

Fundamental rights, we said, present two basic problems in a federal union. On the one hand, there is the problem of conflicts between federal law and state guarantees of fundamental rights. On the other, there is the question of whether federal guarantees shall be applied to state legislation. The first ←——— has been no problem in the United States because the supremacy clause of the Constitution states that federal law shall be supreme, "any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding."[100] The question of the applicability of the federal Bill of Rights to state law has, on the contrary, been one of the Supreme Court's continuing concerns. It has been on this question, moreover, that the Court has made perhaps its most profound contribution to legal integration in the United States, although a contribution arrived at at a comparatively late date.

There are essentially two ways of viewing a federal bill of rights. One way sees the bill of rights as imposing limits only on the federal government -- the government, that is, established by the constitution of which the bill of rights forms a part. The other way sees the constitution, and the bill of rights with it, forming the supreme law of the land and thus limiting state as well as federal governments. The first ten amendments, adopted in 1791 and forming the original federal Bill of Rights in the United States, do not on the whole say which is the correct way for them to be viewed. With the exception of the First and Seventh Amendments, these amendments do not state that they are addressed only to the federal government.[101] Moreover, the supremacy clause does state that the Constitution (as well as federal law generally) enjoys supremacy as against the states. Nevertheless, in an early Marshall opinion the Supreme Court chose the former view, holding that the Bill of Rights limits only the powers of the federal

government.[102] Under this decision, the states were left free to protect or disregard such rights as they pleased, subject to a few exceptions, such as the prohibitions of bills of attainder and ex post facto laws, which expressly applied to them as well as to the federal government.[103] Slavery is only the most vivid example in American history of unequal protection among the states, and it, of course, proved to be a problem that neither the courts (if they had wished) nor Congress could resolve.

This more limited view of the federal Bill of Rights might have prevailed even until today but for the adoption of the so-called Civil War amendments. For, these amendments specifically prohibit state infringement of certain individual rights, and the Fourteenth Amendment in particular couches these prohibitions in very vague and general terms. It speaks against deprivations of "life, liberty, or property, without due process of law" and against denials of "the equal protection of the laws."[104] Called upon to give meaning to these vague and elusive terms, the Supreme Court in the last one hundred-odd years has gradually interpreted them to embrace an ever-expanding core of the restrictions contained in the original Bill of Rights.[105] Its earlier decision assigning a relatively limited role to

the Bill of Rights has thus been reversed in fact, if never explicitly overruled. Needless to say, the integrational impact of this development has been tremendous and its potential is far from being exhausted.

## IV. Transnationalism, Judicial Review and Integration In Europe — In Light of the American Experience

European legal integration in our time begins in a serious way with the foundation of the European Community. The Community, of course, differs in many and profound ways from the United States. Its members are subjects of international law, have their own foreign policies and currencies and are ultimately responsible for the defense of their citizens.[106] Its "legislative" institutions and processes are very different. Its most important policy-making institution, the Council, is more a diplomatic round-table than a true Community institution.[107] Although in theory it can act on many issues by qualified or simple majority vote, in practice, its decisions usually are adopted unanimously and consequently often reflect the lowest common denominator among the positions of the Member States.[108] The Community further has no strong executive branch. Its policies and rules for the most part depend on national authorities for their enforcement.[109] The European Community is thus a much looser organization of states than the United States. In many ways, indeed, it resembles the organization

of the original thirteen American states under the Articles of Confederation.[110] But, in two important ways it differs from that short-lived confederation: it has a court and it has the power to adopt rules having direct effect on the citizens of the Member States.[111] These two differences help explain in a not insignificant way, we think, the Community's comparative success and the considerable progress it has made in legal integration. For the Court of Justice established by the Community has contributed greatly to European integration and it has been able to do so in large part because Community law operates directly on the citizens of the Member States. Let us consider then the Court's contribution.

## A. Supremacy

### 1. The "Constitutionalization" of the Treaties.

There are perhaps no more profound differences between the European Community and the United States than the related facts that the Community was founded on the basis of international Treaties, and that these Treaties failed to declare clearly whether Community law would enjoy supremacy among

the Member States. Thus a crucial initial task facing the Community's Court of Justice has required the "constitutionalization" of the Treaties, a process implying both the elevation of the Treaties to "higher law" status and their interpretation by techniques more appropriate to constitutions than to multipartite treaties.[112]

Both aspects of the process have been manifest in the Court's elaboration of the doctrine of direct effect and unflagging insistence, since its famous decision in 1964 in Costa v. ENEL,[113] that Community law, both primary and secondary, is preeminent vis-à-vis both prior and subsequent national law (including even national constitutional law).[114] The doctrine of direct effect, first announced in 1963 and since much elaborated, has come to mean that the provisions of the Treaties[115] establishing the Community, as well as secondary Community legislation, bestow enforceable rights and obligations not just on the Member States, but also on their citizens.[116]

The enforcement of Community law thus does not wholly depend on the cooperation of the governments of the Member States. Citizens with Community-created rights can themselves directly enforce those rights in judicial proceedings, but, it should be noted, in proceedings brought in their own national courts. For, unlike the United States, the Community itself has no system of lower courts with "original" jurisdiction to hear cases raising issues of Community law.[117] The effectiveness of the Court of Justice in enforcing its vision of Community supremacy, and of Community law generally, must depend, therefore, on the cooperation of national courts.

2. The Case of France. ⟶ Direct effect and supremacy present very difficult questions for national courts, threatening as they do the traditional supremacy of national parliaments and cherished concepts of national sovereignty. Nowhere, understandably, has the delicacy of these issues been more evident than in France where they have had quite different receptions from different courts. On the one hand the Conseil d'Etat has refused to control French administrative law with Community law,[118] while on the other the Cour de Cassation in the case of Administration des Douanes v. Société Cafés Jacques Vabre[119] has upheld Community supremacy in declining to give application to French legislation in conflict with the Community Treaties.

[One theory argued in both cases (and apparently accepted by the Conseil d'Etat) was that judicial non-application of French legislation because of its conflict with international treaty law (in particular, with the Treaties establishing the European Community) would be tantamount to judicial review of the constitutionality of legislation. It would in fact -- so the argument went -- involve the control of a possible Parliamentary violation of Art. 55 of the Constitution, which establishes that "the treaties or /international/ accords regularly ratified or approved have, from their publication, an authority superior to that of the laws, upon reservation, for each accord or treaty, of its application by the other party."

To be sure, /this specter of gouvernement des juges was averted by the Cour de Cassation, which, while deciding that courts are indeed bound not to give application to French legislation if it is in conflict with international treaty law in general, and with Community law in particular, took care to proclaim through its Procureur Général that this is not a form of judicial review of the constitutionality of legislation; it is mere interpretation -- the judges' typical function. It is, so the argument continued, the natural role of the judge to apply a law having a "higher authority," rather than a conflicting lower law; and Community law -- or, more generally, international treaty law -- is higher law, without being constitutional law.[120] It is enough to formulate such an argument, however, to see the plain, albeit so painstakingly denied, analogy to the Marbury doctrine.[121] Chief Justice Marshall, too,

no less than the French Court, tried to minimize -- if not hide -- judicial review by reducing it to terms of mere interpretation.[122]

Needless to say, the implications of this reasoning by the French Court, were it to prevail, are extremely far-reaching.[123] To be sure, the holding is concerned with international treaty law, but this term, in the light of the authoritative submissions by the Procureur Général, certainly extends to Community law generally. This means that the Court's holding is not limited to "primary" Community law (the Treaties, including the very broad European Economic Community Treaty) but also includes that large and rapidly expanding body of "secondary" Community law, which is enacted by Community organs and which, by virtue of Art. 189 EEC Treaty and other Treaty provisions, is capable of having direct applicability and direct effect in all the Member States.[124]

3. → The Community System of Judicial Review. As the Cafés Jacques Vabre case illustrates, the supremacy doctrine, coupled with the doctrine of direct effect, brings about a Community system of judicial review. All the many thousands of national judges in the now ten Member States are entitled, and indeed obliged, to control the conformity of national legislation to

Community law and to deny application to the former whenever it is found violative of the "higher" Community law applicable in the case at hand.[125] This trans-national review system, in which Community law assumes a role analogous to federal law vis-à-vis state law in the United States, or to confederal law vis-à-vis cantonal law in Switzerland, is strengthened by the possibility and, in some cases, by the obligation of the national courts to turn to the European Court of Justice at Luxembourg for a binding ruling concerning the interpretation or validity of the relevant Community provisions.[126] And, not unlike a holding of the U.S. Supreme Court, such a ruling has precedential effect -- thus representing a powerful instrument for the uniform interpretation of Community law throughout the ten Member States.[127]

4. → Acceptance of the Supremacy Doctrine and the Case of the United Kingdom. The supremacy doctrine, despite the resistance of the Conseil d'Etat, has been accepted by (at least) all of the other original members: Germany, Italy and the Benelux countries.[128] And, it can have been no surprise to the four newer Member States of the Community -- the United Kingdom, Ireland, Denmark and Greece -- since the doctrine was already longstanding at the time of their accession.[129] Supremacy should prove to represent no serious problem for the latter three countries, in which, unlike in the United Kingdom, there is a

tradition recognizing both a hierarchy of norms and the power of the Irish, Danish and Greek courts, or some of them, to control the conformity of lower to higher laws.[130] But the problem , not yet resolved by high court decisions, is very serious and hotly debated in the first of the four newer members.[131] England's most basic constitutional principle -- its "Grundnorm" [132] -- has long been the unlimited supremacy of Parliament, the corollary of which is the most rigid refusal of any judicial power to control Parliamentary legislation. To be sure, the European Communities Act 1972,[133] which marked the United Kingdom's accession to the European Community, affirms that country's willingness to accept the principle of the direct applicability of Community law (Section 2 (1)) and, more generally, to make its own the jurisprudence of the European Court of Justice (which, of course, includes the supremacy doctrine) (Section 3). Also, the Act seems to make some verbal effort to bind even future English legislators to comply with Community law (Section 2 (4)). Yet, if the British Grundnorm is not abandoned, no present Parliament will be able to restrict the will of any future Parliament -- which is manifestly a

principle incompatible with the central idea of federalism and transnationalism, i.e., the inability of state law to supersede validly enacted federal or transnational law. To be sure,

the final result of this "great debate" in the United Kingdom will depend, we suppose, not so much on legal as on political developments.[134] If, on the one hand, the United Kingdom eventually accepts the supremacy doctrine, by that very fact a novel form of judicial review will have been adopted by a nation which, even more rigorously than France, has purported to reject all forms of judicial review since, at least, its "Glorious Revolution" of 1688. On the other hand, a refusal of that country to confirm the supremacy doctrine would jeopardize the country's very participation in the Community.

The acceptance of Community supremacy is, of course, an essential step in the process of legal integration. To the extent, however, that acceptance is based on the law of international treaties, unfortunate implications may follow. Most serious is the

possibility that changes in municipal doctrine the effect of regarding /international treaties could unilaterally reopen the question of Community supremacy. Of course, one can observe that withdrawal is similarly available to the member that finds Community supremacy distasteful, but that avenue at least will thenceforth deny the benefits of membership to the seceding nation. Thus it has built-in anti-secessionist incentives.

B. Powers

1. Expansion by the Court of Justice. ——→ This is not the place to compare and contrast the legislative powers conferred by the Treaties of the European Community on the institutions of the Community with those possessed by the American Congress although, of course, the extent of such powers must ultimately determine the breadth of possible legal integration. Suffice it to say that the powers granted to the Community to establish a common market are not on their face less expansive than the American commerce clause. True, those powers reflect their free-trade ideology more clearly perhaps than the commerce clause. They are more programmatic in that regard and thus may imply restrictions on the type of action that the

Community, as well as the Member States, may take in regulating commerce.[135] But that is the view of today, and, as with the commerce clause, only history and judicial interpretation will tell the true scope of the Community's powers.

The Court of Justice has already, however, taken significant steps in expanding Community powers through its development of an implied powers doctrine and in its preemption analysis. Its jurisprudence in these areas, it is true, is not without its inconsistencies and false starts, arising in part, no doubt, from the sui generis nature of the Treaties, which are neither wholly treaties nor wholly constitution.[136] As the Court's vision of the Treaties as constitution comes more clearly into focus, however, these problems may be expected to recede.

2. Implied Powers. The implied powers doctrine was given its classic formulation, again, by Chief Justice Marshall:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.[137]

The difficulty with the Community adopting this formulation is that treaties, unlike constitutions, are concerned more with problems than with powers. While they may create international institutions to solve specific problems, and grant limited powers thereto, such powers are not infrequently inadequate to solve the problems addressed. In these instances, rarely are the purposes of the organization then allowed to define and expand the powers granted to it by the treaty. A carefully drafted treaty will, therefore, contain procedures for expanding, if necessary, institutional powers to address unforeseen problems. The "small treaty revision" procedure contained in the Community Treaties is an example.[138]

Against this doctrinal background, it is not surprising that the Court of Justice has vacillated over the question of implied powers. On the one hand, in the ERTA case it read Article 210 of the EEC Treaty, providing that "the Community shall have legal personality," to mean that the Community enjoys treaty-making powers equal in substantive scope to its internal legislative powers despite the fact that specific provisions of the Treaty had given the Community only limited treaty-making powers.[139] On the other hand, it has at

times read the Treaties very narrowly, for example, denying that ECSC/Article 70, paragraph 3, which requires that "the scales, rates and all other tariff rules of every kind applied to the carriage of coal and steel within each Member State and between Member States shall be published or brought to the knowledge of the High Authority," endowed the High Authority with executive power to require trucking tariffs to be published or otherwise communicated to it.[140]

Troubling as these inconsistencies may appear, however, at this stage of the Community's development, implied powers are perhaps not fundamentally a judicial problem. Implied powers tend to be executive powers, they are concerned with appropriate ways of executing legitimate policies.[141] A strong implied powers doctrine then ensures executive flexibility. But in the Community, executive weakness is more than anything a constitutional problem. For the most part, the Community does not execute its own policies; the Member States do.[142] The Community's executive weakness is thus probably too fundamental to be remedied by a strong implied powers doctrine.

3. Preemption.

Preemption presents a somewhat different story, although one also related to the nature of the Treaties. Preemption, it should be recalled, means different things, but one thing it always means in a federal or transnational system is the sacrifice of state or national prerogatives to overriding federal or transnational interests. These overriding interests may be present in the constitution itself (in which case preemption is not involved at all in a strict sense) or they may be reflected in federal or transnational legislation. Now most federal constitutions do not express interests in so many words. They establish a form of government and distribute powers.[143] They leave the expression of interests to the political process and to the future. In such a system, as in the United States, one presumes that the constitutional enumeration of powers belonging to the federal government does not prevent the states from exercising the same powers[144] so long as they do not use these powers in contravention of a specific federal law or policy.

The Community Treaties, however, differ from a pure constitutional document, *inter alia*, in that they contain

programmatic commands for "common" policies and harmonization.[145] These commands naturally call into question the presumption in favor of concurrent powers. For, might not one say that where common policies are a constitutional goal, local policies are ipso facto unconstitutional? The programmatic nature of the Treaties thus has supported a "preemption" analysis proceeding from teleological premises quite opposed to one of the fundamental premises of American federalism: the interstitial nature of federal law even in the areas of federal competence.[146]

The effect of these premises, moreover, has been to transform the preemption doctrine, at least in the early jurisprudence of the Court of Justice, from a method of balancing transnational and national interests into a weapon for restricting national powers. Thus, in the early jurisprudence, wherever the Community planted its flag, it was declared by the Court to have occupied the field.[147] But, if it is indeed true that the Community's political processes result in much of its policies reflecting the lowest common denominator of positions among the Member States, then the danger of this approach should be obvious. Subsequently, however, the Court has begun to take a less dogmatic and formalistic, more

pragmatic approach to preemption questions, an approach, it must be said, more fully consistent with the constitutionalization of the Treaties, although obviously less integrationalist in effect. Under this approach, which of course bears greater resemblance to that in the United States, the Court has been more willing to let stand national legislation in areas of Community power and concern. It should be noted, however, that the Court's later jurisprudence has not been entirely free of formalistic retreats.[148/]

C. Procedures

Despite the many difficulties of constitutionalizing the Community Treaties, it is clear that the Court of Justice has already made profound substantive contributions to European legal integration: in declaring the supremacy of Community law, in conferring Community legal rights on the individual, and more generally in defining, in a more or less expansive manner, Community legislative powers. We must now ask whether the Community has developed the procedures to make Community law, supreme in principle, uniformly applicable and available throughout the Member States. In answering this question we will see reappear many of the issues that have arisen in the United States from the tensions between competing federal and state court systems. Most important of these issues is, again, the access-

to-justice question : to what extent will local procedures be permitted to affect Community rights?

1. Decentralized Community Review and the "Preliminary Ruling" Procedure. The Community, as we have noted, has adopted a method of decentralized control of Community validity: every judge (from the lowest juge conciliateur to the highest constitutional court) in each of the ten states is given the power to question the Community validity of national laws. Since the judges of one national legal system are not bound to follow precedents from other national legal systems, it is clear that the potential for national divergence and contradiction in interpretation is immense. If we add to this the fact that several of the ten member states also have two or more separate court systems, each with a superior (in practice supreme) court at its head,[149] we see that there is a great possibility of conflict even within a single national system. And if finally we remember that eight of the systems are Civil Law systems, with no formal doctrine of stare decisis, then it would seem that such a decentralized system of control is doomed to chaos and, ultimately, to failure.

The Community has, however, more or less successfully solved these primary problems of

decentralized control by adopting a "preliminary ruling" procedure. The Treaties provide that any judge who in a case before him is faced with a question of Community law may, and in certain cases must, refer the question to the European Court for a preliminary ruling on the interpretation of the Community provision.[150] Through this system, "Community review," although generally decentralized, is nevertheless subject to a centralized control which effectively corrects the shortcomings of the decentralized system. More importantly in light of the American federal experience, the Court, according to the Treaties, is the final authoritative interpreter of Community law,[151] and according to the Court's own jurisprudence, its decisions (as part of "Community law") not only have precedential value within the Member States, but are also superior in effect to any national law -- including the decisions of national courts.[152] It is clear, therefore, that any interpretation given by the Court in any case is an extremely persuasive -- even a binding -- authority on any national court. It is this central position of authority which allows the measure of success enjoyed by this system of decentralized judicial control.

2. Possibilities for Manipulation.——→The supremacy of the Court of Justice in the interpretation of Community law would thus seem to be assured. In practice, however, as in the United States where state courts can to an extent prevent Supreme Court review of their interpretations of federal law by interposing independent state law grounds for their decisions, uncooperative national courts, even those of last instance, can manipulate the Community's system of judicial review. This possibility arises in part from the language of EEC Article 177, and in part from the Court of Justice's own jurisprudence. Article 177, which is the basis of the Court's preliminary ruling jurisdiction, limits such jurisdiction to cases raising "questions" of "interpretation". And the Court, in stressing the precedential effect of its decisions, has held that even national courts of last instance, which by the terms of Article 177 are required to refer questions of Community law to the Court, need not do so if the issue to be addressed has already been decided in a prior decision of the Court.[153] Thus, taken together, Article 177 and the Court's jurisprudence suggest that dubiousness is a jurisdictional criterion -- that

is, there must be some doubt as to the proper interpretation of the Community law in question before a referral is required.[154]

The introduction of such a concept into Community law, particularly when application of the law requires the cooperation of different legal systems, has its obvious dangers. These dangers have emerged, for example, in the application by some national courts of the "acte clair" doctrine, which in French law determines when a question of law must be referred by the civil to the administrative courts.[155] Under that doctrine, referral is required only if the issue raises "une difficulté réelle ... de nature à faire naître un doute dans un esprit éclairé."[156] The doctrine is clearly capable of abuse, and, in fact, has been relied upon by the French Conseil d'Etat in refusing to refer questions of Community law to the Court of Justice in situations where other national courts, faced with similar issues, have been less self-assured.[157]

3. Procedural Barriers to Access.

A second problem, which was also met in the American context, is that of procedural barriers to the vindication of substantive Community rights.[158]

In the United States, of course, the problems of state procedural barriers are somewhat overcome by the existence of lower federal courts, with broad jurisdiction to decide federal questions, as well as by the Supreme Court's development of doctrines designed to balance the competing claims of state procedural purity and federal rights.[159] The Community, on the other hand, has no system of independent lower courts. Thus, one might expect the Court of Justice to have been even more sensitive than its American counterpart to the inevitable tensions between procedure and substance. Instead, it has so far declined to encroach on national procedural prerogatives. It has, however, begun to develop principles that may permit it to do so in the future. Thus, for example, it has declared that national procedures that cut off Community rights must be "reasonable," must not totally preclude or unduly restrict the defense of such rights, and must not discriminate against claimants of Community rights.[160] The Court's deference to national procedure at the expense of Community uniformity may, of course, result from a shrewd political judgment. Under the judicial system established by the Community, national courts are indispensable to the enforcement of the Court's

refer issues to the Court and jurisprudence. Only they can/apply and enforce the Court's judgments in the crucial Article 177 cases. Sensitivity to its own weakness thus may have convinced the Court to avoid a direct confrontation with the national courts.

D. Fundamental Rights

Fundamental rights are one subject over which a direct confrontation between the Court of Justice and at least one national court has proved impossible to avoid../ For, unlike the U.S. Constitution, the Treaties creating the Community fail to resolve the status of Community law vis-à-vis national constitutional law. The Treaties, moreover, do not themselves include a bill of rights. Fundamental rights have thus become one of the greatest challenges to the Court, as well as one of its greatest opportunities -- an opportunity because the Court has perceived, rightly we think, that the only way realistically to insure the Member States' adherence to Community supremacy even as against their own constitutional guarantees is for itself to guarantee Community respect for fundamental rights. The judicial resolution of this

conflict between Community law and national guarantees may thus contain the seeds of the Community "Bill of Rights" the fathers of the Community did not consider necessary to include in the Treaties.[161] we will return to this point after discussing another and more immediate transnational source of human rights.

1. The European Convention of Human Rights.

This more immediate source, one that affects not just the "Little Europe" of the Ten, but also the larger Europe of the (by now) twenty-one members of the Council of Europe/ -- all the countries of Western Europe except Finland -- is the European Convention for the Protection of Human Rights and Fundamental Freedoms.[162] Unlike Community law, no doctrine of direct effect and supremacy has been developed by the Convention's transnational adjudicators. Hence, every member state applies its own general approach as to the effects of international treaty law within its own national system. As a consequence, the effects of the Convention[163] range from a maximum in Austria, where international treaty law is recognized to have the same force as national constitutional law, to a minimum in such countries as the United Kingdom and the Scandinavian nations. In these latter countries the Convention is not recognized to have direct effect, and therefore it cannot as such be invoked as binding law in the national courts. An

intermediate position is occupied by countries such as Belgium and (if the reasoning of the Cour de Cassation in Cafés Jacques Vabre, based as it is on the law of international treaties, prevails) France, where international treaty law and, therefore, the Convention itself are attributed a force superior to ordinary national legislation, without being attributed constitutional status. Also occupying an intermediate position are Germany and Italy where, apparently, the Convention has direct effect but with a status equal to ordinary national law, and thus susceptible to being superseded by subsequent national law.[164]

Because the effects of the Convention depend on national law, its power to promote harmonization of fundamental rights is obviously somewhat limited. Nonetheless, it is not unimportant. For, unlike other documents such as the United Nations' Declaration of Human Rights of 1948,[165] the European Convention is accompanied by important machinery for its enforcement, including the Commission and the Court of Human Rights sitting at Strasbourg.[166] Perhaps the most innovative feature, however, is the "optional clause" of art. 25 of the Convention, whereby signatories may accept a

dramatic enlargement of standing to file a complaint with the Commission (and possibly, through the Commission, eventually to the Court) of Human Rights.[167] Fifteen of the member states have so far adopted the clause: Austria, Belgium, Denmark, the Federal Republic of Germany, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and the United Kingdom [168] -- and France, under the presidency of Mitterrand is now expected to follow suit. Thus, those fifteen states have allowed their own nationals — about two hundred and eighty million Europeans [169] — to attack before the Commission any violation of the Convention by any sort of state action, whether legislative, administrative, or even judicial, after exhaustion of effective domestic remedies. To be sure, the decisions taken by the transnational adjudicators at Strasbourg are not automatically enforceable in the member states, unlike decisions of the European Community's Court of Justice at Luxembourg.[170] Compliance, however, does represent an international law duty for the member states and, as a matter of fact, decisions have so far been complied with, even in cases where they have required dramatic legislative changes.[171]

2. Community Law and the Issue of Human Rights. ⟶ ⟶ The greater potential for the development of a jurisprudence of fundamental rights still remains, however, with the European Community's Court of Justice, despite the omission of a "bill of rights" from the Treaties of the European Community. ⟵ Surely this omission is not surprising if we recall that, in arguing for the ratification of the United States Constitution notwithstanding the absence at that time of a bill of rights, Alexander Hamilton said in the Federalist that the limited powers of the federal government made such a bill unnecessary.[172] This view was shared by James Madison who, in a letter to Thomas Jefferson, explained in 1788 that a bill of rights was unimportant because "the limited powers of the federal Government and the jealousy of the subordinate Governments, afford a security which had not existed in the case of State Governments."[173] Presumably, the framers of the Community Treaties also believed that the scope of Community law was essentially limited to economic integration problems and that human rights issues would hardly be involved.

The legislative appetite of the modern welfare state, however, has disproved this belief. Due to its rapid expansion into many areas of modern social as well as economic life, Community law has become increasingly involved with crucial issues ranging from property and labor rights to nationality and sex discrimination.[174] Thus, a problem which in the fifties might have appeared to be merely an abstract hypothetical of little practical significance has become one of the hottest issues of both constitutional and Community law in the Europe of the seventies and eighties. In May 1974 the debate took the character, and revealed the dangers, of an acute conflict of international dimensions. In the clamorous Internationale Handelsgesellschaft decision the Bundesverfassungsgericht, over the strong dissent of three of its Justices, affirmed the inapplicability in Germany of Community law -- at least, of secondary Community law -- if this law is found to be in conflict with the fundamental human rights provisions of the Grundgesetz.[175] Thus did the crisis of the Treaties' failure to definitively declare Community supremacy come to a critical impasse.

This decision aroused a prompt and vigorous protest against Germany by the Commission of the European Community.[176] The Commission made it clear that the German Constitutional Court's decision was a challenge to the unity of Community law which, by its very nature, must be uniformly and simultaneously applied throughout the entire Community. But the most important and elaborate reaction to the dangerous, although allegedly only provisional,[177] "secession" of the German Constitutional Court has come from the Community's Court of Justice. Indeed, the Court had not even waited for the German decision to take a firm, clear, and -- so it seems to us at least -- perfectly reasonable position on the issue at stake. Already in 1969, in Stauder v. City of Ulm[178] the Court had stated that Community law must not "jeopardize the fundamental rights of the individual contained in the general principles of the law of the Community." This far-reaching statement was further developed in later cases, especially in Nold v. Commission,[179] a decision taken just a few days before the German Constitutional Court's decision. In Nold the European Court of Justice said, inter alia:

> As this Court has already held, fundamental rights form an integral part of the general principles of law which it enforces. In assuring the protection of such rights, this Court is required to base itself on the constitutional traditions common to the member-States and therefore could not allow measures which are incompatible with the fundamental rights recognised and guaranteed by the constitutions of such States. The international treaties on the protection of human rights in which the member-States have co-operated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law. It is in the light of these principles that the plaints raised by the applicant should be assessed.[180]

Thus the Court of Justice, while on the one hand accepting a conception whereby Community law, although superior to all national laws, is itself bound to respect a higher law, especially in the area of human rights, on the other hand affirmed the transnational character of such higher law. In the Court's doctrine, in fact,this higher law is not identifiable with any single Member State's Constitution or constitutional tradition; rather, it is itself (unwritten) Community law.[181] And, it is the role of the European Court of Justice -- not of any national court -- to give the final word in "finding" such a higher Community law, even though the Court's finding must be based on the constitutional

traditions (not of one, but) of all the Member States, as well as on such international treaties as the European Convention on Human Rights to which all the Ten have adhered.[182]

3. Integrational Effect of the (Unwritten) Community Bill of Rights. To be sure, it is not self-evident that the developing doctrine of fundamental Community rights will have a direct effect on member state legislation. To extend the view of John Marshall,[183] a Community bill of rights would limit only Community action, while national legislation (as well as other national state action) would be subject only to such rights as were guaranteed in the constitutions of the respective members. Under this narrow conception of the constitutional role of a federal or transnational bill of rights, the European Court's developing doctrine of fundamental Community rights could have an integrative impact only indirectly, as Community legislation, respecting these fundamental guarantees, preempts new areas of the national legal order.

The operation of this indirect effect can be perceived, for example, in Rutili v. Minister for the Interior[184], where the Court used fundamental rights concepts to interpret Article 48 of the EEC Treaty

(concerning the free movement of workers) as well as the Community's implementing regulations and directives, in order to determine if French administrative law was in compliance therewith. Drawing on various sources, including the European Convention on Human Rights, the Court first concluded that the freedom of movement and equality of treatment demanded by the first two clauses of Article 48 were "fundamental principles". From this conclusion, the Court reasoned that any derogation from these rights "on the grounds of public policy", as permitted by clause (3) of that Article, must be "interpreted strictly".[185] The Court of Justice thus did not directly require French law to observe fundamental Community rights. Rather, the result was reached indirectly in the process of interpreting the Treaty and the secondary legislation thereunder. Nonetheless, to an American observer, the parallels with Supreme Court analysis of suspect legislative classifications, requiring "strict scrutiny" under the equal protection clause of the Fourteenth Amendment, surely will be striking.[186]

At any rate, it should be recalled that Chief Justice Marshall's narrow view did not resist for long the test of history in America. The story of this basic development[187] might one future day provide a valuable precedent for European developments.

## V. The "Mighty Problem" in European Integration[188]

Not surprisingly, the Court's efforts to prevent national constitutional attacks on Community legislation by developing a Community "bill of rights" have raised anew the issue of democratic legitimacy, which, as noted,[189] over the centuries has remained the "mighty problem" of judicial review. Indeed, as stated by both the majority and the dissenting opinions of the Bundesverfassungsgericht in Internationale Handelsgesellschaft, this question is central to the more immediate concern of whether Community law is superior to even the constitutional law of the Member States. In this debate, curiously, the question posed is less the acceptability of judicial review[190] than its adequacy in providing a final protection of fundamental rights in the absence of a written "bill of rights". At controversy is not so much judicial review per se as the legitimacy of Community supremacy. The way in which the question is presented thus suggests the profound changes in European attitudes towards judicial review that have taken place in recent decades. Nonetheless, because the question of Community supremacy vis-à-vis even national constitutional guarantees is so vital to the future

progress of legal integration, some reconsideration of the "mighty problem" seems imperative.

A. The Legitimacy Problem of Community Judicial Review -- Especially in the Human Rights Area

The two sides of this latest European version of the debate are well articulated by the majority and minority opinions of the German Constitutional Court. In the words of the majority:

> /T/he present state of integration of the Community is of crucial importance. The Community still lacks a democratically legitimated parliament directly elected by general suffrage which possesses legislative powers and to which the Community organs empowered to legislate are fully responsible on a political level; it still lacks in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution... . As long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights, is not achieved in the course of further integration of the Community, ... the /German/ Constitution applies. 191/

And so runs the response of the minority:

> The argument that the fundamental rights of the Constitution must ... prevail over secondary Community law because the Community still lacks a directly legitimated parliament is not in itself conclusive. The protection of fundamental rights and the democratic principle are not interchangeable inside a democratically constituted Community based on the idea of freedom; they complement one another. While the achievement of the democratic principle in the EEC would cause the legislator and the executive to be more deeply concerned with fundamental rights, this would not make the judicial protection of fundamental rights superfluous. 192/

The debate, thus cast, asks what is the sine qua non of a government based on the concept of ordered liberty.

Certainly parliamentary democracy is an important part of the answer, and we think many would agree that the transfer of legislative powers to the now directly-elected European Parliament would be a progressive step both for integration and for the protection of fundamental rights at the Community level. However, it is unlikely that parliamentary rule will soon be adopted in the Community, and, at any rate, we do not believe that establishment of a strong European Parliament would moot the question of the desirability of judicial protection of fundamental rights. Judicial protection of fundamental rights would still be needed even in a parliamentary Community.[193] The real questions then are, (i) what court should be empowered to review Community legislation for fidelity to fundamental rights, and (ii) what standards are needed to guide that court in choosing those rights that are indeed fundamental.

(i) → It is evident that in the Community one would naturally choose to entrust the Court of Justice with the task of protecting fundamental rights

from incursions by Community legislation, if for no other reason (and we believe it is an important reason) than that only the Court of Justice can speak for the whole Community and thus preserve legal uniformity in the Community.

Therefore, if we are to permit this important responsibility to devolve instead upon the several supreme / (whether or not constitutional) courts of the Member States — a development sure to impede Community integration and thus contrary to the Community's own Grundnorm -- we must be compelled to do so by reasons strong enough to overcome our presumption in favor of the Court of Justice.

(ii) → The principal reason for disfavoring the Court of Justice, and apparently the decisive reason for the majority of the German Constitutional Court, is that the Court of Justice peculiarly lacks that most basic tool of constitutional adjudication: a written Community bill of rights. This fact furthermore may be argued to cut doubly against the Court's claim to the role of ultimate guarantor of fundamental rights in the Community. For it means on the one hand that we have no way of knowing what Community fundamental rights are apart from the pronouncement of the Court of Justice.

No one can point to them in a document and insist on their being respected by the Judges. Thus these rights must seem especially insecure. Second, the lack of a written bill of rights may be said to weaken the democratic legitimacy of the judicial undertaking itself. Judges, as has been noted, are not democratically responsible, or at least less so than elected representatives.[194] Thus when in constitutional cases they substitute their own will (or, more stricly, some vague and undocumented principle of "higher law") for that of the legislature and thereby invalidate duly-enacted laws, democracy is said to suffer. If, on the other hand, the norms that they apply in striking down legislation can be drawn directly from a constitution adopted by the people or their representatives, then, so the argument goes, it is not the irresponsible judges who have frustrated the people's will, but the people themselves.[195]

Attractive as these arguments may be at first glance, they turn out on closer examination not to be very compelling at all, and certainly not compelling enough to overcome our presumption in favor of giving

the Court of Justice the ultimate judicial authority in the Community as regards questions of fundamental rights.[196] First, it should be observed that these arguments *contra* the Court's supremacy are rooted in the idea that there is a sharp contrast between judicial "interpretation" and "law-making" and that precise substantive provisions are essential to the existence of legal rights and to the judicial nature of a legal decision. This, however, is a fundamental misconception of the law, and especially so in the case of fundamental rights. In the adjudication of fundamental values, the written text can hardly be more than a starting point of the judicial inquiry. Witness, for example, the rights that, in American constitutional law, have been subsumed under the authority of the due process and equal protection clauses of the Fourteenth Amendment.[197] These practically empty vessels have been found to contain almost all the specific rights enumerated in the original Bill of Rights. Although textual in the sense that they can be located somewhere in the Constitution, these rights can have found their way into the Fourteenth Amendment only by appeal to such important extra-textual sources as "tradition" and "general consensus," the "idea of progress," "natural law" etc. Without

these supplemental sources, such key concepts as due process, freedom and equality could have had no ascertainable meaning.

Thus, the key concepts of any bill of rights can have concrete meaning only if we seek interpretive assistance from sources outside the text. To be sure, these outside sources are themselves supposed to be objective and verifiable. Yet we share the scepticism of the critics of a value-protecting approach to judicial review [198] that by glossing the text of a bill of rights with these extra-textual values judges somehow make judicial review "impersonal," "noncreative" and merely "interpretive." Indeed, we are sceptical that there is a sharp difference between "interpretive" and "non-interpretive" judicial review, [199] and that the Court of Justice when it articulates and protects fundamental values without benefit of a written bill of rights is doing something significantly different than, say, the German Bundesverfassungsgericht when it does so on the basis of the Grundgesetz. Impersonal values simply do not exist. Values protected by means of judicial review are inevitably, to a certain extent, judge-made, and such fundamental rights as we enjoy depend much more on the vigilance of the judges than on the words of the text.[200] Thus, although written bills of rights have been historically important

to the protection of fundamental rights, they are neither a necessary nor a sufficient condition to the identification and protection of these rights.

B. No Better Legitimacy of National Courts Fundamental values, then, are inevitably, to a certain extent, judge-made. This conclusion, which we believe is difficult to refute since it is borne out by world-wide historical experience, has in addition important implications for the illegitimacy objection to the Court of Justice's becoming ultimate arbiter of fundamental rights in the Community. For it seriously undermines the claim by national courts such as the Bundesverfassungsgericht that they possess superior legitimacy. Their claim is of course that adjudication must be "enabled by law," rather than by such broad standards as "general principles" or, for that matter, "equity", "reason," and the like. Indeed, this is part of what in Civil Law countries has been called the "principle of legality" or "Rechtsstaatsprinzip," i.e., the "rule of law." And, since law is often identified with legislation, the majoritarian will, which characterizes democratic legislation, thus indirectly becomes an element of legitimate adjudication as well.

Yet we all know that the "law" is to a large extent a myth -- and never more so, as we have just observed, than when the legal text is a bill of rights in which vague value-concepts are largely inevitable.

Moreover, because constitutions demand relative immutability, the text of a bill of rights is apt to speak with the voice of a ghostly, long-dead majority. The argument is thus a frail one indeed upon which to rest the legitimacy of judicial protection of fundamental rights. We must therefore seek elsewhere for the legitimacy of judicial review.

C. Where Legitimacy of Judicial Review Rests In our view the error is in seeking the legitimacy of judicial review -- and, more generally, of judicial law-making -- in the same criteria which legitimize legislation. The democratic legitimacy of judicial decision-making depends, rather, on other criteria, criteria, more importantly, which apply as well to the Court of Justice as to the Bundesverfassungsgericht or any other national court. Foremost among these criteria are the procedural characteristics of the judicial process, which restrain the judicial power, for no one wants judges unrestrainedly making law, and develop in the judiciary the vision to see and articulate the values that society holds fundamental. These basic characteristics are the connection of adjudication with "cases and controversies," hence with "parties," and the impartial attitude of the adjudicator who must not judge in re sua, must assure a fair hearing to the parties (audi et alteram partem), and must be assured a degree of

independence from outside pressures, especially those coming from the "political" branches.[201] Thus, these rules of what has been called "natural justice" demand that for many centuries

the judge be _super partes_, and, therefore, that he not decide in his own case and be not subject to partisan pressures; also, they demand that the parties, all of the parties, be given a fair opportunity to be heard personally or through their representatives by the judge.[202] A third rule, whether or not implied in those two, is no less fundamental. It indicates that, unlike both the legislative and the administrative processes, the judicial process is not initiated by the adjudicator on his own motion, "_ex officio_": it needs a claimant,

a plaintiff, an actor to be initiated -- if not also to be further carried on once it has been brought by the party to the court.[203] These are the basic characteristics which so deeply differentiate the judicial process from the "political" ones, and these characteristics are, at one and the same time, the basic limits but also the formidable and unique strength of that process.

The above characteristics are, of course, formal or structural-procedural in nature. They indicate the mode, or the basic contours of the mode, of the judicial action. Their procedural nature, however, should not be taken as a limitation of their importance.[204] Indeed, the fact that such characteristics are of a procedural and structural nature may indicate that they are, to some extent, more stable and less subject to radical transformations than would be the case with characteristics of a substantive nature.[205] Even though the "concretization" of those characteristics may, and indeed does, vary from time to time and from place to place, they mark the contours, as it were, of the very nature of the judicial process, no matter where and when. Their flexibility might be great, but not unlimited. A judge who decides a case not brought to him by a party; a judge who does not give the parties a reasonable

themselves;
opportunity to defend a judge who decided his own case -- such a judge might still wear the judicial robe and call himself a judge, but he would no longer be a judge.[206]

D. Judicial Review as a Tool to Strengthen a System's Democratic Legitimacy.

It is these procedural qualities, moreover, that make the courts and judicial review so essential (and hence legitimate) even in the purest parliamentary democracy,[207] which of course the Community is far from being. Because access to the courts requires only a complaint, the courts protect the overall representativeness of the democratic system by affording a hearing to persons and groups who cannot gain access to the political process.[208] In addition, as Professor Martin Shapiro has noted, speaking in particular of the U.S. Supreme Court,

> The Court's proceedings are judicial; that is they involve adversary proceedings between two parties viewed as equal invididuals. Therefore, marginal groups can expect a much more favorable hearing from the Court than from bodies which, quite correctly, look beyond the individual to the political strength he can bring into the arena. The Court's powers are essentially political. Therefore marginal groups can expect of the Court the political support which they cannot find elsewhere. [209]

Shapiro's emphasis on the "judicial" nature of the proceedings, notwithstanding the "political" character of the powers exercised through these

proceedings, offers the clue to a further consideration. Surely, democratic government is essentially one in which people enjoy an equal opportunity to "participate," a right which is nowhere completely guaranteed by the right to vote alone, and certainly not by that right as it exists in the Community today. Hence, in theory at least, the Court has a potential for reinforcing the Community system's democratic character. In practice, of course, the real question -- indeed, the very concrete aspect of the "mighty problem" in the Community -- is who shall have the final judicial voice on questions of fundamental rights. Is the Court of Justice somehow unsuited to this task?

Judges, including, of course, the Judges of that Court, can themselves become distant bureaucrats, insulated from their time and society, but when this occurs healthy democratic systems, and, we believe, the Community too, have the capacity to intervene and correct -- through the instruments of reciprocal controls. Thus, unacceptable judicial law-making can be repealed by legislation and, at the apex, even by constitutional or Treaty amendment.[210] On the other hand, the Judges can find in the very "nature" of their judicial proceedings [211] the formidable antidote to the danger of their losing contact with the people. [212] Even when they decide disputes of broad societal significance -- as is often the case especially with adjudication of "constitutional" questions -- their very function still is to decide actual "cases and controversies" rooted in daily life and daily brought to them by the ——————→

interested members of the community, or by some of these members, or -- as is often the case with the European Court -- referred to them by courts in the Member States; in this sense, the judicial process, including that of the Court at Luxembourg, is par excellence a participatory process.

Moreover, the qualities that suit the Court to the search for fundamental values are, in part, a product of its very function. As Professor Alexander Bickel most vividly described in relation to the U.S. Supreme Court, there is in the Court a unique combination of, on the one hand, what he called a scholar's "insulation" -- which is "crucial in sorting out the enduring values of a society" -- and, on the other hand, the concern "with the flesh and blood" of actual cases, as opposed to the legislator who deals "typically with abstract or dimly foreseen problems."[213] As noted above, this unique combination is, in fact, also the unique potential strength of the judicial function. It gives the courts the possibility to be in continuous contact with the actual and most concrete problems of society, while at the same time giving them enough independence and detachment from the moment's pressures and whims. Indeed, it is this combination that "predestines" the courts, in the long run, as Professor Henry M. Hart, Jr., put it,

> to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles.214/

To sum up and answer our question -- is the Court of Justice somehow unsuited to this challenge? -- our conclusion then is: we do not see how, and we thus can see no reason why the presumption in favor of its judicial supremacy, even on questions of fundamental rights, should be overcome.

## VI. → Conclusion

The tremendous difficulties undertaken by the European Court of Justice in the attempted constitutional evolution of the European Community are obvious enough. Everybody appreciates that Europe is not like, say, the American Union. Differences are more profound; they involve cultures and languages as well as political and social mores, religious attitudes and, not least, economic structures and conditions. Nor are the Treaties of the European Community like the U.S. Constitution. Thus, in profound ways, the task undertaken by the European Court has been, and will continue to be, much more controversial and difficult than that, itself controversial and difficult enough, of its American counterpart. It has had to define the powers and limits of a new, unique legal order with minimal constitutional guidance. It has had no clear supremacy clause and →

no bill of rights. It has had no support from a strong central government: not from the European Parliament, for this Parliament, even with the recent blessing of election by universal suffrage, still possesses only advisory and supervisory, not legislative powers; not from the Council of Ministers, for the Council is notoriously the least Community-oriented of all the Community organs; and not from the Commission, since for a decade and a half this organ's powers have been drastically reduced by national, or nationalistic, interests and rivalries.

There is, of course, a risk that, ironically, the Court's daring vision of a strong Community may have subtly contributed to the Community's very difficulties in developing strong political institutions.[215] For it seems reasonable to conjecture that the Member States might, for example, have permitted the Council to adopt policy more frequently by majority or qualified majority voting if there had been developed no such sweeping doctrines as those of the direct effect, supremacy and preemption of Community law. If so, the Council might have become more than the diplomatic round table that it is today. On the other hand, it is hard to imagine the Court's jurisprudence developing in any other way or at a less rapid pace than it has, given the Court's vision of a strong Community. Questions such

as direct effect, supremacy and human rights have been simply too important to await a later day when the Council and Commission too might have shared this vision. There is no such thing as incremental supremacy. The issue, once given away, could not, under normal circumstances at least, have been regained.

Thus, it is partly because of the absence of strong political institutions that the Court's bold undertaking -- from supremacy to human rights -- has been and remains so necessary.[216] The question, of course, could be asked once again -- why should such a task be left to a court? But, while we have tried to answer that old and abstract question in its more general terms, in its most real terms the problem is not one of abstract legitimacy; rather, it is a very concrete problem of whether the European Court of Justice will have enough time, firmness and imagination, and will command enough respect, to be able to develop, in connection with cases and controversies brought to its jurisdiction, such a coherent body of decisions as can eventually be looked upon as authoritative in the Community, even in such sensitive areas as human rights.[217] No abstract answer can be given to this problem, since the answer depends on the infinite imponderables of the political life of peoples and communities. Ours can only be a hope, not a certainty -- and a belief that Europe's best future lies in integration.

It is, however, an educated hope -- supported by many arguments, by strong pressures, and by clear indications of converging trends. Let us mention a few of them.

First, if it is plausible that today Europe is much more diverse than the American Union, it seems unlikely that diversity is more profound in the Old Continent today than it used to be not only two centuries ago,[218] but even less than one hundred years ago, in a country of continental size with many races and religions, the combination of enormous wealth and striking misery, the wounds of civil war and slavery, and with a European-like, refined, industrialized East, a colonial-like Deep South, an agrarian Middle West, and an adventurous Far West.

Second, social and economic pressures toward integration in Europe, which call for legal interventions, are great and lasting. Such pressures come from millions of Southern Europeans who live as migrant workers in the North, as well as from the many and powerful multi-national corporations which are but the

reflection of the necessarily multi-national character of modern economic processes and structures. They come from the increasingly integrated culture of individuals and groups throughout Europe. They come from the growing awareness that the achievement of a supranational dimension, political, economic, and legal, is the most natural solution to the bizarre, untenable situation of the present division of a relatively small Continent into more than twenty allegedly "sovereign" states,[219] as well as from the awareness that, by universalizing fundamental values, peoples will grow more and more unbearable closer, the risks of conflicts and wars will diminish, and new enriching syntheses will emerge from divergent customs, cultures, races and traditions.[220]

These syntheses, in Europe as in America, are born of pluralism. In the legal order, national statutory law, once virtually the only "law of the land" at least in Continental Europe, now has many companions and competitors: the "higher law" of the constitutions; the laws of the Community, which also claim a "higher law" status, higher even than that of national constitutions; written and unwritten "general principles," both national and transnational;

national and multi-national bill of rights .... And with all that a new role for adjudicators naturally emerges, because the adjudicators' role is always enhanced and magnified by pluralism and competition of law-making sources. Pluralism and competition demand comparison and control; they demand judicial review.

At the highest level of transnational constitutional adjudication, pluralism and competition require the synthesis of common norms, of fundamental values applicable to all the member states. As put by a noted German commentator,

> To evolve common principles from the various constitutional systems of the member states a comparative method is needed. What does this mean? It is not possible to transfer definite formulations or details from the one or the other national order.... The general principles observed in the Community must be uniform, they cannot vary from case to case according to the nationality of the parties concerned. The comparative analysis cannot cling to particular details, but must follow the general trend of the evolution of legal prescriptions; it must lead to a result acceptable in all member states. Its object must be to find the rules best suited to express a common tradition and compatible with the structure of the Community.[221]

Common principles and traditions are clearly not the mechanical sum, but rather the selective choice of the "best" and "most suitable" principles and traditions found in the Member States.

The search for such principles and traditions clearly requires great discretion, wisdom and restraint. The nature of the judicial process, we think, peculiarly suits this search and enables the judiciary, perhaps more than the political branches, to discover and articulate common values in a pluralistic society.

## Footnotes



+ Portions of this study are based upon and sometimes literally drawn from an Article by M. Cappelletti previously published in 53 S. Cal. L. Rev. 409 (infra note 2) and an essay by the same author being published in the Monash U. L. Rev. The authors would like to thank Sam Krislov, C.D. Ehlermann and Joseph Weiler, who commented helpfully on an earlier draft of this study.

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1. It is perhaps more common to speak of the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community together as the European Communities. In view of their extensive institutional integration, however, we have chosen to refer to them collectively as the European Community.

2. Similarly, lack of judicial review remained one of the principal weaknesses of European efforts in the nineteenth and first half of the twentieth centuries to establish the supremacy of constitutional law and meaningful checks on legislative powers.

See § II.B.(2), infra. See also Cappelletti, The Significance of Judicial Review in the Contemporary World, in Ius Privatum Gentium, Festschrift für Max Rheinstein 147 (E. von Caemmerer, S. Mentschikoff and K. Zweigert eds. 1969) [hereinafter cited as Significance of Judicial Review]. For the history of judicial review, see generally M. Cappelletti, Judicial Review in the Contemporary World (1971) [hereinafter cited as Judicial Review], and M. Cappelletti & W. Cohen, Comparative Constitutional Law ch. 1 (1979) [hereinafter cited as Comparative Const'l Law]. For a preliminary report touching on certain aspects of the role of judicial review in legal integration, see Cappelletti, The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis, 53 S. Cal. L. Rev. 409 (1980), also published, with some revisions, in 1979/2 Legal Issues of European Integration 1 [hereinafter cited from this latter version, unless otherwise indicated, as Mighty Problem].

3. See J. Weiler, Supranationalism Revisited - Retrospective and Prospective: The European Communities after Thirty Years 79-83 (EUI Internal Working Paper No. 2, European University Institute, Florence, 1981).

4. This challenge is, in many ways, an "access-to-justice" challenge. The access-to-justice challenge is not, of course, found only in federal or transnational unions, it is present world-wide. See generally Access to Justice (M. Cappelletti gen. ed. 1978-79); Vol. I, Books 1 & 2: A World Survey (M. Cappelletti & B. Garth eds. 1978); Vol. II, Books 1 & 2: Promising Institutions (M. Cappelletti & J. Weisner eds. 1978-1979); Vol. III: Emerging Issues and Perspectives (M. Cappelletti & B. Garth eds. 1979); Vol. IV: Access to Justice in an Anthropological Perspective (K.F. Koch ed. 1979). See especially M. Cappelletti & B. Garth, Access to Justice: The Worldwide Movement to Make Rights Effective. A General Report, in id., Vol. I, Book 1, at 3-124.

5. This would seem to be true at least to the extent that there is a converging recognition among Western nations of a common core of fundamental rights.

6. Comparative scholarship, unlike, say, natural law theories, seeks a common core of fundamental values in the tangible corpus of positive law of various countries (see Schlesinger, The Common Core of Legal Systems: An Emerging Subject of Comparative Study, in XXth Century Comparative and Conflicts Law 65, K. Nadelman, A. von Mehren & J. Hazard eds. 1961), as well as convergences and divergences in the evolution of that positive law -- and the reasons for such convergences and divergences (see Comparative Const'l Law, supra note 2, passim).

7. The Convention for the Protection of Human Rights and Fundamental Freedoms was signed in Rome in 1950 and entered into force in 1953. It can be read in European Treaty Series [Europ. T. S.] No. 5 (1950). There have been several subsequent Protocols to the Convention: Protocol 1, Europ. T.S. No. 9 (1952); Protocol 2, Europ. T.S. No. 44 (1963); Protocol 3, Europ. T.S. No. 45 (1963); Protocol 4, Europ. T.S. No. 46 (1963); and Protocol 5, Europ. T.S. No. 55 (1966).

8. 5 U.S. (1 Cranch) 137 (1803).

9. See Judicial Review, supra note 2, at 26-27, 52 and the references therein.

10. A. de Tocqueville, 1 De la Démocratie en Amérique 179-80 (1840).

11. See generally Mighty Problem, supra note 2.

12. See Chief Justice Burger's dissent in Eisenstadt v. Baird, 405 U.S. 438, 472 (1972).

13. Citations seem superfluous; they would include much of the library-sized American literature on judicial review. Solely for the benefit of non-American readers, I will refer to the discussion and the selected bibliographical information in the influential university textbook by G. Gunther, Cases and Materials on Constitutional Law 3-25 (10th ed., 1980).

For a recent insightful discussion by a noted European jurist see Koopmans, Legislature and Judiciary -- Present Trends, in New Perspectives for a Common Law of Europe 309-337, especially at 322-332 (M. Cappelletti ed. 1978) [hereinafter cited as New Perspectives].

A most recent and unconditional, but alas, pretty insular plea by a British authority against judicial review -- indeed, more generally, against "a written constitution, a Bill of Rights, a supreme court, and the rest" -- is Professor J.A.G. Griffith's Chorley Lecture, The Political Constitution, 42 Mod. L. Rev. 1, 17 (1979).

14. Recent debaters have included R. Berger, Government by Judiciary (1977); J. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (1980); A. Cox, The Role of the Supreme Court in American Government (1976); J. H. Ely, Democracy and Distrust (1980); Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 Stan. L. Rev. 843 (1978) [hereinafter cited as Origins]; and id., Do We Have an Unwritten Constitution, 27 Stan. L. Rev. 703 (1975) [hereinafter cited as Unwritten Constitution]. The list is by no means exhaustive.

15. O. Holmes, Collected Legal Papers 295-96 (1920).

16 See Significance of Judicial Review, supra note 2, at 149-50, Cappelletti & Adams, Judicial Review of Legislation European Antecedents and Adaptations, 79 Harv. L. Rev. 1207 (1966).

17. See § V.C., infra.

18. Judicial Review, supra note 2, at 33-34 and the references therein.

19. Id. at 35.

20. The famous passage by Montesquieu describing judges as "la bouche qui prononce les paroles de la loi, des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur," is contained in Book XI, Chapter VI of De l'esprit des lois, see 1 Oeuvres complètes de Montesquieu 217 (A. Masson ed. 1950).

21. Judicial Review, supra note 2, at 36 and the references therein; see also, e.g., J.H.Merryman, The Civil Law Tradition ch. III (1969).

22. W.Blackstone, Commentaries on the Laws of England 157-159 (1765). See also E.S. Corwin, The "Higher Law" Background of American Constitutional Law 86 (1963).

23. See generally id. at 87 et passim.

24. Significance of Judicial Review, supra note 2, at 158.

25. As is well known, Bentham emphasized the vices of judiciary law, which in his opinion was uncertain, obscure, confused, and difficult to ascertain. Hence his advocacy of codification. See The Collected Works of Jeremy Bentham, Of Laws in General, especially at 184-95, 232-36, 239-40 (H.L.A. Hart ed. 1970). Cf. Barwick, Judiciary Law: Some Observations Thereon, 33 Current Legal Prob. 239 (1980) (pointing out that Bentham realistically did not expect codification to eradicate judiciary law).

26. See Judicial Review, supra note 2, at 32-33. The French Constitution of 1958, however, has substantially expanded the possibility of constitutional control of legislation. This development is more fully discussed at § II.C.(1), infra.

27. See Significance of Judicial Review, supra note 2, at 149 and the references therein.

28. Id.

29. Schultze, Environment and the Economy: Managing the Relationship, in Resources for an Uncertain Future 87, 88 (C. Hitch ed. 1978). As noted by the author, then chief economic adviser to President Carter:

> [T]he role of the government in the United States ... until recently was confined principally to a limited sphere of activities. These include producing or supporting the production of goods that private enterprise could not or should not handle; enforcing the rules of the game through contract law and antitrust policies; redressing through taxes and transfer payments the maldistribution of income; and for one reason or another, regulating a highly select sphere of private

> activities, such as transportation, electric utilities, and financial institutions.
>
> But the chief characteristic of environmental and other health and safety side effects is that they are not restricted to any well-defined set of activities. Indeed, they are pervasive, running throughout the private production and consumption decisions of millions of business firms and hundreds of millions of consumers.

Id. See also Arrow, Government Regulation: Pluses and Minuses, 39 Ecom. Impact 68 (1981) (reprinted from the March 1981 issue of Harper's Magazine). The author, following Richard Musgrave, classifies the Government's functions in the welfare state in terms of "allocation, distribution and stabilization." Id. at 71.

30. Id. As for affluence:

> When we earn our daily bread by the sweat of our brow, amenities are not very important. But environmental amenities become terribly important, the less we sweat and the more bread we have.

Id. at 89.

Urbanization, of course, by "sheer physical closeness," id., is a source of environmental problems, tensions, and damages. And,

> because we are technologically advancing, we create ... new ways of despoiling the environment ... /B/ecause we are a dynamic economy, firms and production processes are constantly shifting about, so that environmental standards in any one location ... have to change to accommodate the birth and death of firms and establishments. And finally, because we are chemically inventive, we are continually increasing the numbers of new chemical compounds whose yet unknown side effects may be dangerous.

Id.

Clearly, the problem of environmental externalities involves the challenge of "/shaping/ millions of individual decisions ... toward social ends without strangling our other goals, especially economic growth and reasonable freedom of choice." Id. at 90. This is what Professor Arrow, supra note 29, at 71, calls the allocation function of government.

31. As Nobel prize winner Kenneth Arrow has observed:

> We have no ... mechanism by which the pollution which a firm imposes on the neighborhood is paid for. Therefore the firm will have a tendency to pollute more than is desirable .... /S/ince it does not pay that cost, there is no profit incentive to refrain .... There are many other examples of this kind, but /it/ will serve to illustrate the point in question: some effort must be made to alter the profit-maximizing behavior of firms in these cases where it is imposing costs on others which are not easily compensated through an appropriate set of prices.

Arrow, Social Responsibility and Economic Efficiency, 21 Pub. Pol'y 306-07 (1973).

32. Schultze, supra note 29, at 95-99. See also Arrow, supra note 31, at 310-17.

33. G. Gilmore, The Ages of American Law 95 (1977); and, see the analysis, which opens with Gilmore's definition, in Guido Calabresi's 1977 Holmes Lectures entitled The Common Law Function in the Age of Statutes (cited from the unpublished text kindly submitted by the author); see also Calabresi, Incentives, Regulation and the Problem of Legal Obsolescence, in New Perspectives, supra note 13, at 299.

34. See, e.g., A. Miller, Judicial Activism and American Constitutionalism: Some Notes and Reflections, in Constitutionalism (Nomos XX) 333, 358 (J. Pennock & J. Chapman eds. 1979) and Friedman, Claims, Disputes, Conflicts and the Modern Welfare State, in Access to Justice and the Welfare State 251, 257 (M. Cappelletti ed. 1981). In an essay in the same volume a leading French scholar speaks of "police state" -- which is indeed the fearful risk, but hopefully not the necessary result, of the welfare state. Tunc, The Quest for Justice, in id. at 315, 349. On the profound metamorphosis of administrative law in modern America, see, e.g., the penetrating study by Professor Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667 (1975). Much of what the author says about the United States would apply to Western Europe as well.

35. Koopmans, supra note 13, at 314-15.

36. The changes brought about by the welfare state are thoughtfully described by Professor (now Judge) Koopmans:

> /R/epresentative systems of government prided themselves on embodying, by their very nature, the consent of the governed: the people living under the law established by their own elected representatives. Nowadays, ... the thread between a vote cast for a Member of Parliament and the many decisions by public authorities affecting the voter has become very long and thin; it requires some imagination to see that these decisions are ultimately supported by an enabling statute in the far background. And the voter, apparently, is less inclined to see these decisions as "legitimate" than he used to be. His misgivings in this regard can be perceived throughout the major industrialized countries of the West.

Id. at 315.

37. The Constitution limits the legislative jurisdiction of Parliament by listing the subject matters within its competence (art. 34). All non-enumerated subjects are reserved to the legislative jurisdiction of the "pouvoir réglementaire," i.e. to the autonomous law-making power of the executive. To give but one example of the scope of the powers so shifted from the legislative to the executive branch, effective in 1976 the latter was able to enact by various decrees a new Code of Civil Procedure, thus replacing one of the five pillars of the Napoleonic codification sanctified by a tradition more than one and a half centuries old. See also Le domaine de la loi et du règlement. L'application des articles 34 et 37 de la Constitution depuis 1958 -- Bilan et perspectives (Université de Droit, d'Economie et de Science d'Aix-Marseille ed. 1978), and my report, Loi et règlement en droit comparé, id. at 247.

38. See Koopmans, supra note 13, at 321.

39. A comparative study of the constitutional protection of such procedural rights may be found in Comparative Const'l Law, supra note 2, chs. VI-XI. See also Cappelletti, Fundamental Guarantees of the Parties in Civil Proceeding (General Report), in Fundamental Guarantees of the Parties in Civil Litigation / Les garanties fondamentales des parties dans le procès civil 661 ⟶ (M. Cappelletti & D. Tallon eds. 1973).

40. Judgment of June 26, 1959, Conseil d'état, [1959] Dalloz, Jurisprudence [D. Jur.] 541, English translation in Comparative Const'l Law, supra note 2, at 37-38.

41. The preamble of the 1958 Constitution, which, in its turn, incorporates by reference both the Preamble of the 1946 Constitution and the Revolutionary Déclaration of 1789, is the French Bill of Rights.

42. See Comparative Const'l Law, supra note 2, at 38-42. The invocation of "general principles" and "Republican tradition" is nicely contrasted with the current practice of judicial review in the United States by Professor Thomas Grey in Origins, supra note 14, at 844-47, and more extensively in Unwritten Constitution, supra note 14. See further notes 59-60 and accompanying text, infra.

43. See Comparative Const'l Law, supra note 2, at 42-45.

44. See Judgment of July 16, 1971, Con. const., [1971] Journal Officiel de la République Française [J.O.] July 18, 1971, English translation in Comparative Const'l Law, supra note 2, at 50-51, and the remarkable comment by a leading French constitutionalist, Professor M. Duverger, Le Monde, August 7, 1971, English translation in Comparative Const'l Law, supra note 2, at 52-55, openly advocating the abandonment of centuries-old prejudices and the unreserved adoption in France of the Marbury v. Madison doctrine. For a more detailed analysis of this development see id. at 45-72, and the excellent study by Beardsley, Constitutional Review in France, 1975 Sup. Ct. Rev. 189, 225-237.

45. See art. 61 of the French Constitution, as amended in 1974. Originally, standing to challenge a not yet promulgated loi was limited to the President of the Republic, the Prime Minister, and the presidents of either Chamber of Parliament. Since the 1974 amendment, however, a Parliamentary minority of sixty members of either Chamber also has standing to challenge a not yet promulgated loi before the Conseil Constitutionnel.

46. See the Verfassungsüberleitungsgesetz of May 1, 1945; see generally Judicial Review, supra note 2, at 46-47, 72-74.

47. For Italy see arts. 134-137 of the Constitution; the constitutional laws of February 9, 1948, No. 1, and March 11, 1953, No. 1; and the ordinary law of March 11, 1953, No. 87. For Germany see arts. 93-94, 99-100 of the Bonner Grundgesetz, and the ordinary law of March 12, 1951 on the Bundesverfassungsgericht and subsequent amendments. See generally Judicial Review, supra note 2, at 50, 74-77.

48. See id. at 46-51; see also Comparative Const'l Law, supra note 2, at 12-17. A list of the countries that have adopted some form of judicial review of legislation after World War II would also have to include Japan (since 1947), Cyprus (1960), Turkey (1961), Yugoslavia (1963), Sweden (1964), Israel (1969), Greece (1975), Portugal (1976), and Spain (1978). Countries in which systems of judicial review are more ancient include Mexico, Switzerland (limited to Cantonal laws) and Norway (where judicial review has been known since the 19th century), and Denmark (since the early 20th century). Judicial review is also known in most of the Common Law world outside of Great Britain.

49. The impact of the Constitutional Courts in Germany and Italy, and perhaps to a somewhat lesser extent in Austria, has been profound -- particularly, as might be expected, in the area of human rights. To give but one example, all three Constitutional Courts, like their counterpart in the United States, almost contemporaneously decided on the constitutionalit of abortion legislation; indeed, the same is true even for the French Conseil Constitutionnel. The results, however, were quite different. Compare Judgment of January 15, 1975, [French] Con. const., [1975] D.Jur. 529; Judgment of October 11, 1974, [Austrian] Verfassungsgerichtshof, [1974] Erklaerungen des Verfassungsgerichtshofs 221 (both decisions upholding new liberal legislation) and Judgment of February 18, 1975, [Italian] Corte cost., [1975] 43 Raccolta ufficiale delle sentenze e ordinanze delle Corte costituzionale [Rac. uff. corte cost.]

201, [1975] Giurisprudenza Costituzionale [Giur. Cost.] 117 (voiding in part an old "conservative" law), with Judgment of February 25, 1975, [German] Bundesverfassungsgericht, [1975] 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1 (striking down a liberalizing statute). The decisions of the four courts can be found in English translation in Comparative Const'l Law, supra note 2, beginning at 577.

50. For a fuller discussion of the conditions prompting the adoption of centralized versus decentralized control see Judicial Review, supra note 2, chs. III-IV. See also Cappelletti, The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference - or no Difference at All? [hereinafter cited as Stare Decisis], in Festschrift für Konrad Zweigert 381, 383-392 (H. Bernstein, U. Drobnig & H. Kötz eds. 1981).

51. See Judicial Review, supra note 2, at 54-55.

52. See id. at 55-60. While it may be true that the difference in precedential impact between a decision of a court of last resort in the Common Law countries and, say, the French Cour de Cassation or the German Bundesgerichtshof today is less than in years past, see e.g., I K. Zweigert & H. Kötz, Einführung in die Rechtsvergleichung 318 (1971), such a difference → is still important, although for reasons perhaps less attributable to the doctrine of stare decisis itself than to differences in the organization, procedures and personnel of the courts in the Civil and Common Law countries. See Stare Decisis, supra note 50, at 383-389; see also notes 53-55, infra, and accompanying text.

53. See Judicial Review, supra note 2, at 60-66; Stare Decisis, supra note 50, at 383-392.

54. It is true that the U.S. Supreme Court until early in this century also lacked discretionary power to decline to review cases raising issues of lesser significance. But its appellate jurisdiction during this earlier period was also more strictly limited to cases raising real constitutional or federal-state conflicts. See text at notes 90-91, infra.

55. See Judicial Review, supra note 2, at 63; Stare Decisis, supra note 50, at 387.

56. Friedman, supra note 34, at 256; cf. Judicial Review, supra note 2, ch. 2.

57. Origins, supra note 14, at 846, citing Berger, supra note 14; Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971); Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L. J. 920 (1973); Linde, Judges, Critics and the Realist Tradition, 82 Yale L. J. 227 (1972); Monaghan, Of "Liberty" and "Property," 62 Cornell L. J. 405 (1977); Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976); Strong, Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes, 55 N.C.L. Rev. 1 (1976).

58. See Origins, supra note 14, at 845; L. Hand, The Bill of Rights 70 (1962).

59. Origins, supra note 14, at 846.

60. Id. at 844 n. 8.

61. Id.

62. See notes 40-42 and accompanying text, supra.

63. See § IV.D.2., infra.

64. See §§ IV.D.2. and V., infra.

65. U.S. Const. art. VI, cl. 2.

66. See, e.g., Levy, Introduction, in Essays on the Making of the Constitution ix, xi-xii (L.Levy ed. 1969) [hereinafter cited as Essays]. Professor Levy provides a good, short account of the Convention. There are, of course, many other accounts as well. The basic document for the study of the Convention is Farrand, The Records of the Federal Convention (1911).

67. The Articles of Confederation "had established what in the usage of the time was called a 'federal' government, meaning a league or confederacy of autonomous or nearly sovereign states whose central government was their agent and could act only through them and with their consent." Levy, supra note 66, at xii. Levy adds that "the Articles failed mainly because there was no way to force the states to fulfill their obligations or to obey the exercise of such powers as Congress did possess." Id. For example, Congress depended for its funds upon the voluntary cooperation of the states, and requests were frequently denied. By 1786, Congress often even lacked the necessary quorum of nine state delegations for conducting its business. See Scheiber, Federalism and the Constitution: The Original Understanding, in American Law and the Constitutional Order 85, 86 (L. Friedman & H. Scheiber eds. 1978).

68. The resolution was adopted with the New York delegation divided and only Connecticut opposed. 1 Farrand, supra note 66, at 30-31.

69. Levy, supra note 66, at xiii, quoting James Madison's report to Jefferson, who was in Paris at the time.

70. 17 U.S. (4 Wheat.) 316 (1819).

71. The "necessary and proper" clause, art. 1, § 8, cl.18, is, of course, no more than an adjunct to the clauses granting specific powers. Thus, it is not always possible to separate expansive interpretations of the necessary and proper clause from expansive interpretations of the enumerated powers. Compare Kinsella v. United States Ex. Rel. Singleton, 361 U.S. 234, 247 (1960) (the necessary and proper clause is "not itself a grant of power but a caveat that the Congress possesses all the means necessary to carry out" the powers specifically granted) with United States v. Oregon, 366 U.S. 643 (1961) (law providing for the escheat of property of veterans dying intestate is necessary and proper to Congress' enumerated power to raise armies and navies and conduct wars). It is perhaps significant that the former case questioned the validity of applying court martial procedures to civilians and thus involved a conflict between federal law and civil liberty guarantees. The latter involved a straight-forward conflict between federal and state law. In conflicts of the latter type, one may doubt whether there is any very meaningful life left to the old argument that Congress' enumerated powers are limited powers. According to Professor Monaghan, "[t]he radical transformation that has occurred in the structure of 'Our Federalism' in the nearly two centuries of our existence has emptied the concept of

nearly all legal content and replaced it with a frank recognition of the legal hegemony of the national government," Monaghan, The Burger Court and "Our Federalism," Law & Contemp. Prob., Summer 1980, at 39,39. See also Choper, supra note 14, passim, arguing that federal-state relations are largely a political question and ill-suited to judicial mediation; Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954). But cf. National League of Cities v. Usery, 426 U.S. 833 (1976) (striking down 1976 amendments to the Fair Labor Standards Act extending minimum wage and maximum hour regulations to state and local government employees); Kaden, Politics, Money and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 857-68 (1979).

72. One of the principal goals motivating the adoption of the U.S. Constitution was the improvement of the chaotic conditions of commerce among the various states. Thus, art. 1, § 8, cl. 3 provided that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States ...." The framers' desire to create a national market is remarkably similar to a principal aim of the signatories of the EEC Treaty. As a source of legal integration the commerce clause has been important in two ways: first as a limitation on the states' powers to interfere with interstate commerce, and second as a positive source of federal legislative power. Federal power under the commerce clause has been enormously expanded by the Supreme Court in this century. Compare United States v. E.C. Knight Co., 156 U.S. 1 (1895) (sugar refining monopoly not controllable by federal legislation because connection between "manufacturing" and "commerce" was "indirect")

with Katzenbach v. McClung, 379 U.S. 294 (1964) (Congress may prohibit racial discrimination in restaurants since the restaurant business exerts a substantial economic effect on interstate commerce). But cf. National League of Cities v. Usery, 426 U.S. 833 (1976). See generally Bogen, The Hunting of the Shark: An Inquiry into the Limits of Congressional Power Under the Commerce Clause, 8 Wake Forest L. Rev. 187 (1972).

73. The last important non-delegation decisions occurred in 1935. Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Today, the doctrine is virtually moribund. See, e.g., Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976); National Cable Television Ass'n Inc. v. United States, 415 U.S. 236, 341-42 (1974). The modern growth of the federal bureaucracy has, however, revived interest in finding ways of making elected representatives more responsible for administrative law-making. See, e.g., Ely, supra note 14, at 131-34, advocating revival of a non-delegation doctrine; Bruff & Gellhorn, Congressional Control of Administrative Regulation: A Study of Legislative Vetoes, 90 Harv. L. Rev. 1369 (1977), analyzing and criticizing proposals designed to increase Congressional oversight of administrative rule-making; and McGowan, Congress, Courts and Control of Delegated Power, 77 Colum. L. Rev. 1119 (1977), criticizing Congress for shifting oversight responsibilities to the courts.

74. Diplock, The Courts as Legislators, in The Lawyer and Justice 263, 279 (B.W.Harvey ed. 1968).

75. An interesting attempt to create a guaranteed income through the courts is discussed in Krislov, The OEO Lawyers Fail to Constitutionalize a Right to Welfare: A Study in the Uses and Limits of the Judicial Process, 58 U. Minn. L. Rev. 211 (1973).

76. These were the positions of the parties in, for example, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

77. 53 U.S. (12 How.) 299 (1851). Prior to Cooley, the Supreme Court tried unsuccessfully to reach a consensus on how to resolve these conflicts. Sometimes the majority used a definitional analysis: state regulations of "commerce" were prohibited, but so-called "police regulations" were constitutional. See, e.g., Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837).

78. H.P.Hood & Sons v. DuMond, 336 U.S. 525, (1949).

79. See, e.g., Hines v. Davidowitz, 312 U.S. 52 (1941), discussed in Note, Pre-emption as a Preferential Ground: A New Canon of Construction, 12 Stan. L. Rev. 208, 218 (1959). Professor Waelbroeck calls this the "conceptualist-federalist" approach to pre-emption problems (July 1979) (paper delivered at a conference held in Bellagio, Italy; publication forthcoming).

80. See, e.g., Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1941).

81. See, e.g., Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

82. The parallels between the Court's preemption and commerce clause opinions are analyzed in Note, supra note 79, passim.

83. Rice v. Santa Fe Elevator Corp, 331 U.S. 218, 229-30 (1941).

84. See, e.g., the preemption provisions of the Consumer Products Safety Improvements Act of 1976, 15 U.S.C. § 1203.

85. See Weiler, supra note 3, at 65-83.

86. U.S. Const. art. III, § 1.

87. Lower federal courts were established by the first Congress in 1789. 1 Stat. 73.

88. In the words of Judge Cabell,

> /B/efore one Court can dictate to another, ... it must bear, to that other, the relation of an appellate Court. The term appellate, however, necessarily includes the idea of superiority. But one Court cannot be correctly said to be superior to another, unless both of them belong to the same sovereignty. It would be a misapplication of terms to say that a Court of Virginia is superior to a Court of Maryland, or vice versa. The Courts of the United States, therefore, belonging to one sovereignty, cannot be appellate Courts in relation to the State Courts, which belong to a different sovereignty - and of course, their commands or instructions impose no obligations.

Quoted in Gunther, supra note 13, at 39-40. This contention was, of course, rejected by the Supreme Court in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Cf. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (establishing Court review of state criminal convictions).

89. See Bestor, The American Civil War as a Constitutional Crisis, in L. Friedman and H. Scheiber eds., supra note 67, at 219, 233-34.

90. For the first century and a quarter of its existence, the Supreme Court's appellate jurisdiction was defined by Section 25 of the Judiciary Act of 1789, 1 Stat. 73, 85, which limited review to cases where the federal claim was rejected by the highest state court. Changes made by the Act of February 5, 1867, 14 Stat. 385, 386, did not alter this scheme, which lasted substantially intact until 1914. See generally P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 439-40 (2nd ed. 1973) [hereinafter cited as The Federal Courts]. There were in addition the extraordinary writs, but excepting the writ of habeas corpus these have been of minor importance. See also 28 U.S.C. § 2283, which prohibits federal courts from enjoining state proceedings except where expressly authorized by law. Cf. Dombrowski v. Pfister, 380 U.S. 479 (1965) (permitting injunction of state criminal proceedings); Fiss, Dombrowski, 86 Yale L. J. 1103 (1977).

91. The Judiciary Act of 1914, c. 2, 38 Stat. 790, for the first time authorized review in cases where the state court "may have been in favor of the validity of the treaty or statute or authority exercised under the United States" or "against the validity of the State statute or authority claimed to be repugnant to the Constitution, treaties, or laws of the United States" or "in favor of the title, right, privilege, or immunity claimed under the Constitution, treaty, statute, commission, or authority of the United States." Since 1914, periodic revisions have juggled the types of cases falling within the Court's discretionary

certiorari jurisdiction without otherwise substantially affecting its jurisdiction. See generally The Federal Courts, supra note 90, at 440-41.

92. See, e.g., Herb v. Pitcairn, 324 U.S. 117 (1945).

93. See, e.g., Fay v. Noia, 372 U.S. 391 (1963).

94. See, e.g., Williams v. Georgia, 349 U.S. 375 (1955). See generally The Federal Courts, supra note 90, at 470-573.

95. A typical case is Section 10(b) of the Securities Exchange of 1934, 15 U.S.C. § 78j (b), which in broad terms prohibits fraudulent securities transactions and has been interpreted to authorize victims of fraud to sue to recover losses caused by violations of the statute.

96. Bivens v. Six Unknown Named Agents of FBI, 403 U.S. 388 (1971). Bivens created a right against federal officers. Cf. the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1964), creating a cause of action for state violations of federal rights.

97. See, e.g., Campbell v. City of Haverhill, 155 U.S. 610 (1895). Cf. Holmberg v. Armbrecht, 327 U.S. 392 (1946) (state statutes offer guidance, but are not conclusive, in suits at equity). See generally, The Federal Courts, supra note 90, at 825-29; Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66 (1955); Note, A Limitation on Actions for Deprivation of Federal Rights, 68 Colum. L. Rev. 763 (1968); Note, Federal Statutes Without Limitations Provisions, 53 Colum. L. Rev. 68 (1953).

98. See, e.g., Holmberg v. Armbrecht, 327 U.S. 392 (1946). The doctrine has been limited somewhat to cases involving fraud or concealment. Cf. Russell v. Todd, 309 U.S. 280, 287-89 (1940) (suggesting that in the absence of fraud, the state statute is usually allowed to control).

99. See §§ III. A. and B., supra.

100. U.S. Const. art. VI, cl. 2.

101. The First Amendment speaks to "Congress"; the Seventh to "any Court of the United States."

102. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

103. U.S. Const. art. 1, § 10.

104. U.S. Const. amend XIV, § 1.

105. A catalogue of the rights made applicable to the states may be found in Duncan v. Louisiana, 391 U.S. 145 (1968) and, as of a more recent date, in Friendly, Federalism: A Foreword, 86 Yale L. J. 1019, 1027 (1977).

106. By contrast the United States Congress was initially established largely to facilitate the common defense of thirteen states during the American war of independence. Thus, under the Articles of Confederation, Congress had no power to lay taxes or regulate commerce, while the states, on the other hand, were forbidden without congressional consent to send or receive ambassadors, to enter into agreements or treaties with foreign powers or among themselves, or to maintain ships of war or troops

(excepting a militia, which had to be provided) in time of peace (art. VI). Neither could the states engage in war unless invaded or in immediate danger of Indian attack (id.). See generally A.H.Kelly & W.A. Harbison, The American Constitution: Its Origin and Development, ch. 4 (4th ed. 1970). The Articles of Confederation may be read in id., app. 1.

107. See Weiler, supra note 3, at 36-38 (discussing the effect of the Luxembourg Accords); Pescatore, L'Exécutif communautaire: Justification du quadripartisme institué par les traités de Paris et de Rome, [1978] Cahier de droit européen 387, 395 n. 3.

108. Prominent exceptions include the Management Committees. See Commission of the European Communities, Council and Commission Committees, Supplement 2/80 Bull. E.C. (1980); Weiler, supra note 3, at 41-42. It should be noted, however, that the Council formally relies on the Commission for draft legislation and that the Council can amend a Commission proposal only by unanimous vote (art. 149 EEC Treaty) which in theory and perhaps in fact makes it easier to adopt than amend Commission proposals. See A. Parry & S. Hardy, EEC Law § 5-09 (1973).

109. The principal exception is of course Community competition law. See arts. 87 (d) & 89 EEC Treaty.

110. Probably most prominent of the frailties common to both the European Community and the original thirteen American states are fiscal constraints and executive weakness. The United States Congress under the Articles of Confederation lacked power to levy taxes and had to rely on state appropriations to fund the national debt incurred during the war of independence; see notes 67 and 106, supra. These appropriations were →

to be "supplied by the several States, in proportion to the value of all land within each state ... estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint." Art. VIII. However, the requested revenues were frequently withheld by the states, and all attempts to amend the Articles to permit Congress to levy a direct duty on imported goods, thus assuring a reliable income, failed to receive the unanimity required for adoption of amendments. See generally McLaughlin, The Articles of Confederation, in Essays, supra note 66, at 44, 57-59. The expenditures of the European Community are theoretically funded by the Community's "own resources," but in fact an important part of the funds comes from the Member States, which have not been reluctant to protest real or perceived inequities in the allocation of Community receipts and disbursements or even to refuse to make full budgetary contributions. And, Community fiscal control is further weakened by the bizarre division of budgetary powers between the Council of Ministers and the European Parliament, with the Parliament seemingly intent to compensate for its weakness in other areas by acting vigorously on the Council's budget proposals. For details of recent disputes see, e.g., Pipkorn, Legal Implications of the Absence of the Community Budget at the Beginning of a Financial Year, 18 Comm. Mkt. L. Rev. 141 (1981); Sopwith, Legal Aspects of the Community Budget, 17 Comm. Mkt. L. Rev. 315 (1980).

111. It also has considerable powers to regulate commerce, of which the U.S. Congress under the Articles of Confederation had none. Interestingly, the lack of this power made it extremely difficult for the United States to exercise such powers, particularly the treaty-making powers,

as it had. As one scholar has written, "[t]he failure to grant Congress complete power to regulate commerce rendered it difficult or impossible to make a commercial treaty with a foreign nation and to have assurance that the states would comply with its provisions." McLaughin, supra note 110, at 54. A number of states breached even the treaty establishing peace with England at the end of the Revolution. Elkins & McKitrick, The Founding Fathers, 76 Political Sci. Q. 217, 208-09 (1961). By contrast, the European Community, which would seem to possess considerably more circumscribed treaty-making powers than did the American Congress under the Articles of Confederation, has managed through preemptive legislation and broad interpretations of its powers by the Court of Justice to establish credible treaty-making powers. For the expressly granted powers, compare Articles of Confederation, art. IX with arts. 113, 229-231 & 238 EEC Treaty. For the principal decisions of the European Court of Justice expansively defining the Community's treaty-making powers, see Commission v. Council (Re the European Road Transport Agreement, ERTA), [1971] E. Comm. Ct. J. Rep. 263, [1971] Comm. Mkt. L. R. 335; and the decisions discussed in Pescatore, External Relations in the Case-Law of the Court of Justice of the European Communities, 16 Comm. Mkt. L. Rev. 615 (1979). See also Wellenstein, Twenty-Five Years of European Community External Relations, 16 Comm. Mkt. L. Rev. 407 (1979).

Of course, having a court does not mean very much if its decisions are not obeyed. For the record of disobedience in the United States, see Choper, supra note 14, at 140-150.

112. See Weiler, supra note 3, at 8 n. 28: "'Constitutionalization' implies a combined and circular process by which the Treaties were interpreted by techniques associated with constitutional documents rather than multipartite treaties and in which the Treaties both as cause and effect assumed the 'higher law' attributes of a constitution."

113. Preliminary Ruling, Costa v. ENEL, [1964] E. Comm. Ct. J. Rep. 585, [1964] Comm. Mkt. L. R. 425; reprinted in Comparative Const'l Law, supra note 2, at 117-119, 121-127, followed by the important conclusions by Advocate General M. Lagrange at 127-130.

114. See, e.g., Preliminary Ruling, Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel, [1970] E. Comm. Ct. J. Rep. 1125, [1972] Comm. Mkt. L. R. 255, reprinted in E. Stein, P. Hay & M. Waelbroeck, European Community Law and Institutions in Perspective 278, 279-280 (1976) [hereinafter cited as European Community Law].

115. Treaty Establishing the European Coal and Steel Community (ECSC) signed in Paris on April 18, 1951; Treaties establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC), signed in Rome on March 25, 1957.

116. The jurisprudence commences with Preliminary Ruling, Van Gend en Loos v. Nederlandse Administratie der Belastingen, [1963] E. Comm. Ct. J. Rep. 1 (holding that subject to certain conditions, provisions of the EEC Treaty bestowed enforceable rights and obligations as between individuals and Member States) and has since branched in many directions. See, e.g., Preliminary Ruling, Belgische Radio en Televisie v. SABAM, [1974] E. Comm. Ct. J. Rep. 51, [1974] 2 Comm. Mkt. L. R. 238 (holding that articles 85 and 86 of the EEC Treaty may create rights and duties as among private parties, i.e., that they may have "horizontal" direct effect); Preliminary Ruling, Franz Grad v. Finanzamt Traunstein, [1970] E. Comm. Ct. J. Rep. 825, [1971] 1 Comm. Mkt. L. R. 177 (holding that a directive may create rights and duties as between private parties and the government of the Member States, i.e., that they may have "vertical" direct effect). See generally D. Wyatt & A. Dashwood, The Substantive Law of the EEC ch. 3 (1980). As for whether directives may have "horizontal" effect, see Easson, Can Directives Impose Obligations on Individuals?, 4 Eur. L. Rev. 67 (1979); Timmermans, Directives: Their Effect Within National Legal Systems, 16 Comm. Mkt. L. Rev. 533 (1979). For remaining differences between the effect of regulations and directives, see id. at 553-54; Winter, Direct Applicability and Direct Effect. Two Distinct and Different Concepts in Community Law, 9 Comm. Mkt. L. Rev. 425 (1972).

117. Of course, the Court of Justice itself has "original," indeed exclusive, jurisdiction in certain cases arising under the Treaties. See, e.g., arts. 169, 170, 173, 175 & 178-83 EEC Treaty.

118. (Syndicat général des Fabricants de semoules de France, Judgment of March 1, 1968, Conseil d'état, [1968] Lebon 149, English translation at [1970] Comm. Mkt. L. R. 395. See also the position taken by the Conseil in the more

recent Cohn-Bendit case, Judgment of December 22, 1978, Conseil d'état, [1978] Lebon 524, English translation at [1980] 1 Comm. Mkt. L. R. 524, where it refused to follow Court of Justice precedents concerning the direct effect of directives, see note 116 supra, and relying on the "acte clair " doctrine, see text at notes 156-57, infra, held that directives may not be invoked by the citizens of Member States against an individual administrative act. The position taken in the 1968 Semoules case was confirmed in Judgment of October 22, 1979, Union Démocratique du travail, Conseil d'état, [1979] Lebon 383; and in Judgment of October 22, 1979, Election des représentants à l'Assemblée des Communautés européenes, Conseil d'état, [1979] Lebon 385.

119. Judgment of May 24, 1975, Cass. ch. mixte, [1975] Dalloz-Sirey, Jurisprudence [D.S.Jur.] 497, English translation (edited) in Comparative Const'l Law, supra note 2, at 156-168 (including excerpts from the important submissions to the Court by Procureur Général A. Touffait). See also Judgment of December 5, 1978 Baroum Chérif, Cass. crim., [1979] D.S. Jur. 50.

120. See Comparative Const'l Law, supra note 2, at 161-163, and the comments at 169.

121. Id. at 169.

122. "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each .... This is of the very essence of judicial duty." Marbury v. Madison, 5 U.S. (1 Cranch) at 177-178 (1803) (emphasis added). The idea was already emphasized by Alexander Hamilton, Federalist No. 78: "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred ...." (Emphasis added.)

123. For other instances of French defiance suggesting that one should not be too hopeful, see Proposition de loi portant rétablissement de la souveraineté de la République en matière d'énergie nucléaire, No. 917, Assemblée Nationale, 2ème session extraordinaire de 1978-79; Editorial Comments, The Mutton and Lamb Story: Isolated Incident or the Beginning of a New Era?, 17 Comm. Mkt. L. Rev. 311 (1980).

124. For the sake of precision, it should be mentioned that direct effect is limited, naturally enough, to those Community provisions which impose clear, precise, and unconditioned obligations. See, e.g., Preliminary Ruling, Yvonne van Duyn v. Home Office, [1974] E. Comm. Ct. J. Rep. 1337, 1354, [1975] 1 Comm. Mkt. L. R. 1, 9 (submissions of the Advocate General Mayras).

125. See Preliminary Ruling, Amministrazione delle Finanze dello Stato v. Simmenthal Spa (No. 2), [1978] E. Comm. Ct. J. Rep. 629, [1978] 3 Comm. Mkt. L. R. 263. There the Court of Justice ruled that in the case of a conflict between Community law and national law the national courts must apply Community law without waiting for any national procedure to determine the inapplicability of national law. The Italian Constitutional Court had previously required all such conflicts to be first referred to itself for a declaration of unconstitutionality of national law which was in violation of Community law.

Treaty; Treaty;
126. Art. 177 EEC / art. 150 EAEC / art. 41 ECSC Treaty.
For a brief but penetrating analysis of the parallels between U.S. federalism and Community constitutional developments see Casper, The Emerging Constitution of the European Community, 24 The L. Sch. Rec. - U. Chi. 5 (1978).

127. The prevailing doctrine is that the courts of all Member States are bound either to adopt the European Court's interpretation of Community law or to resubmit the question to the Court for a new ruling. Cf. Preliminary Ruling, Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie, [1963] E. Comm. Ct. J. Rep. 31, [1963] Comm. Mkt. L. R. 224. Whether the Court's preliminary rulings under Article 177 have an "erga omnes" effect is apparently a controversial question, although it is hard to understand why given their clear precedential value. The arguments for and against such an effect are discussed in Trabucchi, L'effet "erga omnes" des décisions préjudicielles rendues par la Cour de justice des Communautés européennes, 10 Revue Trimestrielle de Droit Européen 56 (1974) and were strenuously contested by the parties in the Simmenthal case, [1978] E. Comm. Ct. J. Rep. 629, [1978] 3, Comm. Mkt. L. R. 263. The Court, however, declined to discuss the issue.

128. For a description of this development see European Community Law, supra note 114, at 214-242.

129. See the discussion in id. at 96-102, 242-261.

130. See Judicial Review, supra note 2, at 49, 59. On the acceptance of judicial review of the constitutionality of legislation in Ireland and Greece, see J.M. Kelly, Grafting Judicial Review onto a System Founded on Parliamentary Supremacy: The Irish Experience, Document I.U.E. 174/78 (European University Institute, Human Rights Colloquium, June 14-17, 1978); J.M. Kelly, Fundamental Rights in the Irish Law and Constitution 15-36 (2d ed. 1967); and Perifanaki Rotolo, La Corte Suprema nella Costituzione greca del 1975, 29 Rivista trim. di diritto pubblico 183 (1979). On the constitutional position of Ireland and Denmark vis-à-vis Community law, see Lang, Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty, 9 Comm. Mkt. L. Rev. 167 (1972); and Due and Gulmann, Constitutional Implications of Denmark's Accession, 9 Comm. Mkt. L. Rev. 256 (1972). On the constitutional position of Greece, see Evrigenis, Legal and Constitutional Implications of Greek Accession to the European Communities, 17 Comm. Mkt. L. Rev. 157 (1980).

131. In addition to the discussions in Comparative Const'l Law, supra note 2, at 132-145, see, e.g., Winterton, The British Grundnorm: Parliamentary Supremacy Re-examined, 92 L.Q. Rev. 591 (1976); Warner, The Relationship Between European Community Law and the Laws of Member States, 93 L.Q. Rev. 349, 364-366 (1977); Mitchell, Sed Quis Custodiet Ipsos Custodes?, 11 Comm. Mkt. L. Rev. 375 (1974); Welsh, European Economic Community Law Versus United Kingdom Law: A Doctrinal Dilemma, 53 Tex. L. Rev. 1032 (1975); Trindade, Parliamentary Sovereignty and the Primacy of European Community Law, 35 Mod. L. Rev. 375 (1972); among the most recent discussions, Jaconelli, Constitutional Review and Section 2(4) of the European Communities Act 1972, 28

Int'l & Comp. L. Q. 65 (1979).

132. See Winterton, supra note 131.

133. European Communities Act 1972, c. 68.

134. On the various aspects of the "decline," in recent years, of Parliamentary supremacy in the United Kingdom see, e.g., Koopmans, supra note 13, at 319-322.

135. See especially art. 3 EEC Treaty. / Cf. the comment of Professor Waelbroeck that "/I/t is not likely that the Court /of Justice/ would go as far as the U.S. Supreme Court in the Prudential case /Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1948)/ and recognize that the power of the Council to regulate intra-Community trade is not restricted by any limitation which forbids it to discriminate against inter-State commerce and in favour of local trade." Waelbroeck, supra note 79, at 4.

136. Many have tried to place the Community in relation to established forms of government. For a recent review of this literature, see Weiler, supra note 3, at 3-11.

137. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

138. Art. 235 EEC Treaty; / art. 95, par. 1 ECSC Treaty; / art. 203 EAEC Treaty. / These articles, although not identical, in general provide procedures for taking appropriate measures which are necessary to attain Community objectives but have not been specifically included among the Community's powers. → With regard to the Court's implied powers jurisprudence, see generally the good study by C. Mann, The Function of Judicial Decision in European Economic Integration 288-99 (1972).

139. Commission v. Council (Re ——————————> the European Road Transport Agreement, ERTA), [1971] E. Comm. Ct. J. Rep. 263; [1971] Comm. Mkt. L. R. 335.

140. Italy v. High Authority, ——————————> [1960] E. Comm. Ct. J. Rep. 325.

141. In light of the activities undertaken by federal governments today, it cannot but seem quaint that one of the most controversial questions in early American constitutional law, and the question presented in the McCulloch case, was whether Congress had the power to establish a national bank.

142. However, there is nothing in the Treaties that would prohibit creation of an executive branch by the Community.

143. There are, of course, different ways of distributing powers. See, e.g., the British North American Act, 1867, Canada's Constitution, which instead of employing a residuary clause to define Provincial powers enumerates both Dominion and Provincial powers and grants the residue to the federal Parliament, and see J.D. Whyte & W.R. Lederman, Canadian Constitutional Law 4/19-20 (1977) for the way in which this affects questions of the constitutional validity of legislation. One result of the fact that specific powers were granted to the Provinces would appear to be that the idea that federal powers are constitutionally limited is much more alive today in Canada than in the United States. The extent of the difference is evident in contemporary American and Canadian legal scholarship. For example, Professor Choper

has recently argued that the U.S. Supreme Court unnecessarily expends "institutional capital" on reviewing federalism cases, capital better spent on the protection of civil liberties. Choper, supra note 14, ch.4. He therefore urges the Court to treat these allocation of powers issues as nonjusticiable. But is there anything to be gained by ignoring these issues? As Professor Monaghan observes in his review of Professor Choper's book, 94 Harv.L.Rev. 296, 301 (1980), "/c/onstitutional battles over the allocation of power between nation and states occupied center stage for close to two centuries in our constitutional history, but those battles are now over, and their results generally accepted." He might have added that it was the federal government that emerged victorious from these battles. This attitude contrasts nicely with that in, e.g., F.S. Scott, Essays on the Constitution (1977) in which judicial decisions restrictively defining Dominion powers bear much the same onus that substantive due process decisions have borne in American academic tradition.

144. See, e.g., Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), discussed in § III.B.1., supra.

145. See, e.g., arts. 1-3 EEC Treaty.

146. See generally Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489 (1954).

147. See generally Weiler, supra note 3, at 20-23 and Waelbroeck, supra note 79, passim.

148. Weiler, supra note 3, at 23.

149. E.g., a Court of Cassation and a Conseil d'Etat, as in France, Italy and Belgium; or a Bundesgerichtshof, a Bundesverwaltungsgericht, a Bundesfinanzhof, a Bundesarbeitsgericht, and a Bundessozialgericht, as in Germany, each of which is supreme within its jurisdiction.

150. Art. 177 EEC /art. 41 ECSC /art. 150 EAEC./ For the sake of completeness, it should be added that in the legal order of the European Community, judicial review of legislation manifests itself in at least three aspects. The European Court of Justice is empowered to review the validity of the supranational legislation ("secondary" Community law) emanating from Community organs. See especially arts. 173, 174, 184 and 177 (b) EEC. In addition, the Court can review national legislation indirectly, i.e., when the Commission or another member state challenges such legislation as violative of Treaty obligations. See especially Arts. 169 and 170 EEC / The third aspect, the most interesting for our purposes, is discussed in the text.

151. Such is clearly implied by the last paragraph of Article 177 EEC /which requires referrals for a preliminary ruling by national courts from which there is no appeal.

152. See Preliminary Ruling, Da Costa en Schaake N.V. v. Nederlandse Belastingadministratie, [1963] E. Comm. Ct. J. Rep. 31, [1963] Comm. Mkt. L. R. 224 where the Court of Justice took the view that a court of last instance need not refer an issue for a preliminary ruling if the issue has been authoritatively decided by the Court in an earlier case.

153. Id.

154. As to the requirement of "dubiousness," see Mann, supra note 138, at 386-94.

155. Id. at 387 and n. 338.

156. The reference is to 1 Laferrière, Traité de la juridiction administrative 498 (1896).

157. The most egregious instance being the Cohn-Bendit case, Judgment of December 22, 1978, [1978] Lebon 524, English translation in [1980] 1 Comm. Mkt. L. R. 543, where the Conseil, citing the acte clair doctrine, both ignored Court of Justice precedent concerning the possible direct effect of directives and refused to refer the issue to the Court. See note 118, supra.

158. See Weiler, supra note 3, at 65-83.

159. See § III.C., supra.

160. Preliminary Ruling, Rewe-Zentralfinanz v. Landwirtschaftskammer Westfalen-Lippe, [1973] E. Comm. Ct. J. Rep. 1039, [1977] 1 Comm. Mkt. L. R. 533. Discussed in Weiler, supra note 3, at 69-77. That such principles should be taken seriously is perhaps already suggested by the Simmenthal case, discussed supra note 125, where the Court refused to permit national appellate procedures to interfere with the immediacy of Community law.

161. "[T]he builders of the European Communities thought too little about the legal foundations of their edifice and paid too little attention to the protection of the basic rights of the individual within the new European structure." Pescatore, Address on the Application of Community Law in Each of the Member States, in VI Court of Justice of the European Communities, Judicial and Academic Conference 27-28 September 1976 26 (1976).

162. See note 7, supra. The twenty-first member of the Council of Europe, Lichtenstein, unlike all the other members, has yet to ratify the Convention.

163. I.e., of the "self-executing" norms of the Convention. These include most of the Convention's first Section which defines the "rights and freedoms" the Convention intends to protect.

164. See generally Comparative Const'l Law, supra note 2, at 145; A. Drzemczewski, The Domestic Status of the European Convention on Human Rights: New Dimensions, 1977/1 Legal Issues of European Integration 1.

165. On the Universal Declaration see, e.g., L. Sohn and T. Buergenthal, The International Protection of Human Rights (1973).

166. See Comparative Const'l Law, supra note 2, at 145-148.

167. Art. 25 of the Convention stipulates that: "The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right." On this important and profoundly innovative provision of the European Convention, see, e.g., F.G.Jacobs, The European Convention on Human Rights 62 (1975).

168. Despite the ongoing "great debate" in the United Kingdom, see § IV.A.4, supra, there is no national Bill of Rights to be enforced by the British courts. Cf. C.L. Black, Jr., Is There Already a British Bill of Rights? 89 L.Q.Rev. 173 (1973). Moreover, British citizens are not entitled to claim enforcement of the Convention on Human Rights in their national courts. And yet, ironically enough, since 1966 British citizens have been entitled to bring their claims of human rights violations by British state action of the transnational Bill of Rights to the international adjudicators in Strasbourg -- i.e., in France.

The situation is no less paradoxical in France, however. On the basis of Cafés Jacques Vabre, the French citizens would be entitled to claim enforcement of the European Bill of Rights by their national courts. On the other hand, the optional clause of art. 25 of the Convention has not yet been accepted by France, although the new government has promised to do so: French citizens are thus not yet entitled to bring their claims to Strasbourg.

169. Based on the 1980 estimates, as published in 1981 Britannica Book of the Year, the population of the fifteen countries amounts to slightly over 280,000,000.

170. See arts. 187, 192 EEC Treaty.

171. Examples of such decisions can be found in Comparative Const'l Law, supra note 2, at 238 (European Commission of Human Rights, Decision of December 16, 1970, Knechtl v. United Kingdom, [1970] 13 Y.B. Eur. Conv. on Human Rights 730); 240 (European Court of Human Rights, Decision of February 21, 1975, Golder v. United Kingdom, [1975] 18 Y.B. Eur. Conv. on Human Rights 290); 297 (Committee of Ministers of the Council of Europe, Resolution of September 16, 1963, Pataki v. Austria and Dunshirn v. Austria, [1963] 6 Y.B. Eur. Conv. on Human Rights 714); 429 (European Commission of Human Rights, Decision of July 14, 1972, Gussenbauer v. Austria, [1972] 15 Y.B. Eur. Conv. on Human Rights 558).

172. See Comparative Const'l Law, supra note 2, at 177.

173. Id. Madison, of course, was later to change his mind and to become a leading advocate of a Bill of Rights.

174. We will only mention one landmark decision by the Court of Justice of the European Communities on the issue of sex discrimination, Preliminary Ruling, Gabrielle Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, [1976] E.Comm. Ct. J. Rep. 455, [1976] 2 Comm. Mkt. L.R. 98. In this case, the Court of Justice enforced against a private party in Belgium the requirement in art. 119 EEC of equal pay for equal work by men and women. For practical reasons, and at the request of the governments of the U.K. and Ireland, the Court made its ruling only prospective in application (i.e., it would not apply to discriminations which occurred before Defrenne was decided, except for those cases already filed at the time of that decision).

175. Judgment of May 29, 1974, Bundesverfassungsgericht [1974] 37 BVerfGE 271; English translation in Comparative Const'l Law, supra note 2, at 178-187.

176. Id. at 187.

177. The German Court, in fact, emphasized that its decision was of a merely provisional nature. The Court declared that as long as the European Parliament is not democratically legitimized (i.e. elected by universal suffrage), and has not enacted a Bill of Rights adequate in comparison with the fundamental rights contained in the German Constitution, the Court retains the power to review Community regulations for violation of basic rights guaranteed by the German Constitution. Id. at 180-182.

178. [1969] E. Comm. Ct. J. Rep. 419, 425, [1970] Comm. Mkt. L. R. 112, 119.

179. [1974] E. Comm. Ct. J. Rep. 491, [1974] 2 Comm. Mkt. L. R. 338; reprinted in Comparative Const'l Law, supra note 2, at 192-194.

180. [1974] E. Comm. Ct. J. Rep. at 507, 2 Comm. Mkt. L. R. at 354.

181. This point was affirmed by the European Court of Justice already in 1970, Preliminary Ruling, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] E. Comm. Ct. J. Rep. 1125, 1134, [1972] Comm. Mkt. L. R. 1255, 1283, where the Court, after saying that "respect for fundamental rights has an

integral part in the general principles of law of which the Court of Justice ensures respect," stated that: "The protection of such rights, while inspired by the constitutional principles common to the Member-States must be ensured within the framework of the Community's structure and objectives."

182. In a later decision, the reference to the European Convention on Human Rights, which in Nold was merely implicit, was made explicit. Preliminary Ruling, Rutili v. Minister of Interior, [1975] E. Comm. Ct. J. Rep. 1219, [1976] 1 Comm. Mkt. L. R. 140.

183. Barron v. Mayor of Baltimore, 32 U.S.(7 Pet.) 243 (1833).

184. [1975] E. Comm. Ct. J. Rep. 1219, [1976] 1 Comm. Mkt. L. R. 140.

185. [1975] E. Comm. Ct. J. Rep. at 1231, [1976] 1 Comm. Mkt. L. R. at 155.

186. See, e.g., San Antonio School District v. Rodriguez, 411 U.S. 1 (1973); see generally Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977); Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1 (1976).

187. See § III.D., supra.

188. A comparative study by M. Cappelletti now being published in Monash U.L. Rev., from which the following section is drawn, deals more generally with the law-making power of judges, its mode, legitimacy, and limits. We refer to it for a more complete discussion.

189. See § II, supra.

190. This is obviously so if one considers that the German Court itself was engaging in judicial review.

191. Judgment of May 29, 1974, Bundesverfassungsgericht, [1974] 37 BVerfGE 271, [1974] 2 Comm. Mkt. L. R. 540, 550-51 (English translation).

192. [1974] 2 Comm. Mkt. L. R. at 563-64.

193. See § II.C.1, supra.

194. See § II.A, supra.

195. See Unwritten Constitution, supra note 14, at 705; see also Ely, supra note 14, ch. 1.

196. Moreover, if we were going to be clause-bound about it, surely we could make a strong case for the Court's supremacy on the basis of arts. 164 and 177 EEC Treaty.

197. See § III.D., supra.

198. See, e.g., Ely, supra note 14, ch. 3.

199. See text at notes 56-62, supra.

200. Compare the strong language of the First Amendment to the U.S. Constitution guaranteeing freedom of speech with the U.S. Supreme Court's deplorable free speech opinions during World War I, discussed in Chafee, Freedom of Speech in War Time, 32 Harv. L. Rev. 932 (1919). See also Rabban, The First Amendment in its Forgotten Years, 90 Yale L. J. 514 (1981).

201. See the analysis in Cappelletti, Il controllo di costituzionalità delle leggi nel quadro delle funzioni dello Stato, 15 Rivista di diritto processuale 376 (1960). Cf. M. Shapiro, Freedom of Speech: The Supreme Court and Judicial Review 36-37 (1966) (hereinafter cited as Freedom of Speech), and more recently, M. Shapiro, Courts: A Comparative and Political Analysis (1981) where the author concludes that these qualities are nowhere perfectly attained. This of course is true, but from that truth one needs not conclude that they do not nonetheless represent the essential characteristics, as imperfect as they are, of the judicial process.

For the provisions designed to guarantee the independence and impartiality of the Judges of the Court of Justice, see especially arts. 3 (immunity from legal proceedings), 4 (disqualification from holding political office or engaging in other occupations), 6 (removal only on unanimous vote of the other Judges and Advocates General) and 16 (disqualification for conflicts of interest) of the Statute of the Court of Justice of the European Economic Community, signed in Brussels on April 17, 1957.

202. In general, in cases governed by Article 177 ("preliminary ruling" EEC Treaty), the parties to the suit, the Member States, the Commission and where appropriate the Council are entitled to submit statements of case or written observations to the Court of Justice. See Statute of the Court, cit., art. 20; see generally Mortelmans, Observations in the Cases governed by Article 177 of the EEC Treaty: Procedure and Practice, 16 Comm. Mkt. L. Rev. 557 (1979).

203. Whereas all Western legal systems, including the Community system, rather uniformly adhere to the rule that a judicial proceeding, whether civil or criminal, cannot be commenced by a court on its own motion, the further unfolding of the case, once commenced, is frequently subject to the court's control. See, e.g., the excellent discussion in F. James, Jr. & G. Hazard, Jr., Civil Procedure 4-8 (2nd ed. 1977); see also M. Cappelletti, Processo e ideologie 169-218 (1969).

204. As Mr. Justice Douglas, speaking for the U.S. Supreme Court, said in 1971:

> It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.

Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

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205. Note, for example, that the core of "fundamental rights" that scholars have found to be common to most Western legal systems are procedural. See Comparative Const'l Law, supra note 2, chs.VI-XI. By contrast, courts have differed markedly over such "fundamental" substantive rights as the right to have an abortion. See note 49, supra.

206. This is not to say that courts may not legitimately act within certain limited spheres in a legislative, quasi-legislative, or administrative capacity. When they do so, however, they are legislators or administrators, not judges. For instance, courts, especially higher courts, may have a procedural rule-making authority, as is the case in some

Common Law jurisdictions. Cf., e.g., G.J. Hand & D.J. Bentley, Radcliffe and Cross, The English Legal System 309-10, 398 (6th ed. 1977).

207. See also § II.C.1., supra.

208. See United States v. Carolene Products Co. 304 U.S. 144, 152-53 n. 4 (1938). The connection of this reasoning to the Community, which is hardly a representative democracy to begin with, may seem attenuated. But in fact, as the German Bundesverfassungsgericht correctly recognized, the "democracy deficit" should only strengthen the case for an active judicial role. The question is to whom that role should be given.

209. Freedom of Speech, supra note 201, at 37; cf. P. Weiler, Two Models of Judicial Decision-Making, 46 Canadian B. Rev. 406, 468 (1968); Miller, supra note 34, at 363. Professor Shapiro in Freedom of Speech at 34-37 formulates the conception of a "clientele" of the Court, composed of "potential interest groups" which cannot achieve adequate support through the political branches and which can be best served by the Court. "Particularly in legislative bodies, one frequently finds that an overwhelming majority entertains certain sentiments, but few members hold those sentiments strongly enough to be willing to sacrifice certain other crucial interests. A determined minority can then prevent the majority from effectuating its desires by threatening in turn the crucial interests of each category of members composing the majority .... /A/s an example, ... /f/or many years it was just not worth it to many northerners to get civil rights legislation which they mildly wanted at the expense of losing essential southern support for a dairy subsidy, an urban renewal program, or a highway bill,

which at any given moment some of them desperately needed. Here again the Supreme Court may be able to express public sentiment which cannot find a 'hard' majority elsewhere." Id. at 35-36. See also L. Jaffe, English and American Judges as Lawmakers (1969); Ely, supra note 14, passim. Ely concludes that these "representation-reinforcing" qualities are fundamental to the legitimacy of judicial review in a democracy. The situation in the Community is even more extreme, since there a determined Member State → representing a small minority of the Community may easily block needed reforms and, more generally, paralyze legislative or administrative action.

210. The anti-democratic, counter-majoritarian objection raised against judicial law-making is believed by some commentators to be especially strong when constitutional adjudication is involved. See, e.g., A. Bickel, The Least Dangerous Branch 20 (1962); Ely, supra note 14, at 4-5. The argument usually made is that, whereas judicial law-making can be repealed by legislation, at the level of constitutional adjudication the legislature, and thus the majoritarian will, is powerless unless the difficult and rarely used procedures of constitutional amendment are employed. The same argument could of course also apply to judicial interpretations of the Community Treaties. The argument, however, proves too much; if brought to its logical consequences it would exclude the acceptability of binding constitutions altogether, because such constitutions cannot be repealed by simple majoritarian will. Surely the very idea of a binding constitution means recognition that there is a "higher law" above that expressed by the day-to-day majority in the legislature.

211. See Bickel, supra note 210, at 25-26.

212. Greater pains have been taken to make the Court of Justice "representative" than is true, perhaps, with most courts. Terms of appointment are relatively short (six years), and in practice one Judge is appointed to the Court from each Member State.

213. Bickel, supra note 210, at 25-26.

214. Hart, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 99 (1959); see Bickel, supra note 210, at 27.

215. See Weiler, supra note 3, at 45 et passim. The author notes that during its first thirty years the Court has made remarkable contributions to the constitutional framework of European integration, while at the same time the political institutions, perhaps most notably the Council as a result of the Luxembourg accords, have shifted power back to the individual Member States. He speculates that these opposing trends may be causally linked.

216. Cf. Calabresi, Incentives, supra note 33, at 291-307.

217.

> It will not be possible fully to meet all that is said against judicial review. Such is not the way with questions of government. We can only fill the other side of the scales with counter-vailing judgments on the real needs and the actual workings of our society and, of course, with our own portions of faith and hope. Then we can estimate how far the needle has moved.

Bickel, supra note 210, at 24.

218. As John Adams noted in his diary during the First Continental Congress of 1774, "Tedious, indeed is our Business. Slow, as Snails .... Fifty Gentlemen meeting together, all Strangers, are not acquainted with each others Language, Ideas, Views, Designs. They are therefore jealous of each other -- fearfull, timid, skittish." Letters of Delegates to Congress 1774-1789 (U.S. Government Printing Office 1978), reprinted in Int'l Herald Tribune, May 24, 1978.

219. This is counting only the nations of Western Europe.

220. Indeed, the most glorious eras of European civilization have emerged as a result of such great syntheses. See generally, ← Mighty Problem, supra note 2, at nn. 95-103 and accompanying text.

221. Scheuner, Fundamental Rights in European Community Law and in National Constitutional Law, 12 Comm. Mkt. L. Rev. 171, 185 (1975). See also P. Pescatore, The Law of Integration 75-77 (1974); Constantinesco, in Dix ans de jurisprudence de la Cour de Justice des Communautés européennes 205 (1965).